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The history of usury from the earliest p



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THE  
HISTORY OF USURY

FROM

THE EARLIEST PERIOD TO THE PRESENT TIME

TOGETHER WITH A BRIEF STATEMENT OF GENERAL PRINCIPLES CONCERNING THE CONFLICT OF THE LAWS IN  
DIFFERENT STATES AND COUNTRIES

AND

AN EXAMINATION INTO THE POLICY OF LAWS ON USURY AND  
THEIR EFFECT UPON COMMERCE.

BY

J. B. C. MURRAY.

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"I say this only, that usury is a '*concessum propter duritatem cordis*,' for, since there must be borrowing and lending, and men are so hard of heart, as they will not lend freely, *usury must be permitted.*"—LORD BACON.

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## Dedication.

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To STEPHEN COLWELL, Esq.,

&c., &c., &c.:

SIR:—*The learning and research displayed throughout such of your writings upon subjects akin to the following treatise, as I have been fortunate enough to peruse, renders the presentation to you of this volume a not inappropriate testimony of respect from a fellow-laborer. But besides this, the kindness and encouragement I have received at your hands, and which I hold in grateful recollection, have given rise to feelings of personal regard and esteem, that I am anxious to acknowledge.*

*Permit me, then, sir, to present you with this book, and remain always,*

Your greatly obliged friend,

J. B. C. MURRAY.



## P R E F A C E .

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THE following pages are put forth with much diffidence by the author, partly because his pursuits for some years past, having had more relation to the sword than the pen, have unfitted him to wield the latter with that ease and success at which his ambition aims, and with less of familiarity than formerly belonged to him; and partly, also, from a sense of the great difficulty in adequately coping with a subject of such importance as the one he has now attempted. But as the work contains a great deal of new and curious matter never before collected together, and which the author believes will be found alike useful and interesting to the lawyer, the

banker, the merchant, and the general scholar, he hopes its advantages may be allowed to outweigh its defects.

And subscribes himself the public's

Obedient servant,

THE AUTHOR.

PHILADELPHIA, January, 1866.

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## LEGAL INTEREST IN THE SEVERAL STATES.

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THE following table exhibits the *legal rates* of interest in the several States of the Union, and the penalties attached for *usury*:

STATE.	LEGAL RATE.	PENALTY FOR USURY.
Alabama, . . . .	8 per cent.	Forfeit interest and usury only.
Arkansas, <sup>1</sup> . . . .	6 " "	Forfeit usury only.
California, <sup>2</sup> . . . .	10 "	
Connecticut, . . . .	6 "	Usurious contracts utterly void.
Delaware, . . . .	6 "	Forfeit whole debt.
Florida, <sup>3</sup> . . . .	8 "	Forfeit interest and usury.
Georgia, . . . .	7 "	Forfeit interest and usury only.
Illinois, <sup>4</sup> . . . .	6 "	Forfeit interest and usury only.
Indiana, <sup>5</sup> . . . .	6 "	Forfeit double the usury.
Iowa, <sup>6</sup> . . . .	6 "	{ Forfeit ten per cent. on amount of contract.
Kentucky, . . . .	6 "	Forfeit usury only.
Louisiana, <sup>7</sup> . . . .	5 "	Forfeit interest and usury.
Maine, . . . .	6 "	Excess deducted from amount due.
Maryland, <sup>8</sup> . . . .	6 "	Usurious contracts void.
Massachusetts, . .	6 "	{ Forfeit three times the usury, and costs.

<sup>1</sup> By special contract, as high as *ten per cent.*

<sup>2</sup> By special contract, any rate whatever.

<sup>3</sup> *Six per cent.*, when no other rate is expressed by the parties.

<sup>4</sup> By agreement, as high as *ten per cent.*

<sup>5</sup> By agreement, as high as *ten per cent.*

<sup>6</sup> By agreement, as high as *ten per cent.*

<sup>7</sup> Banks allowed the rates expressed in their charters; but conventional interest cannot exceed *ten per cent.*

<sup>8</sup> On tobacco contracts, *eight per cent.*

## X      LEGAL INTEREST IN THE SEVERAL STATES.

STATE.	LEGAL RATE.	PENALTY FOR USURY.
Michigan, <sup>1</sup> . . .	7 per cent.	Contract void for excess of interest only.
Minnesota, <sup>2</sup> . . .	7      "	Forfeit usury and costs.
Mississippi, <sup>3</sup> . . .	6      "	Forfeit interest and usury only.
Missouri, . . .	6      "	Forfeit three times the usury taken.
New Hampshire, .	6      "	Contract void, and forfeit full am't of debt, half to informer.
New Jersey, <sup>4</sup> . . .	6      "	Contracts void; a misdemeanor.
New York, . . .	7      "	Contracts void, and forfeit double the amount of loan.
North Carolina, .	6      "	Excess credited on principal.
Ohio, . . . . .	6      "	Excess deducted from debt.
Pennsylvania, <sup>5</sup> . .	6      "	Forfeit usury only.
Rhode Island, . . .	6      "	Forfeit usury, interest, and costs.
South Carolina, .	7      "	Forfeit excess only.
Tennessee, . . . .	6      "	Forfeit interest and usury only.
Texas, <sup>6</sup> . . . . .	8      "	Forfeit excess; when paid, may be recovered back with interest and costs.
Vermont, . . . . .	6      "	Contract void; lender liable to penalty of <i>twice</i> the debt, recoverable in <i>qui tam</i> action.
Virginia, . . . . .	6      "	Contract valid; but no interest recoverable thereon. <sup>8</sup>
Wisconsin, <sup>7</sup> . . . .	7      "	Usurious contracts void.

<sup>1</sup> By stipulation in writing, as high as *ten per cent.*

<sup>2</sup> By stipulation in writing, as high as *twelve per cent.*

<sup>3</sup> On *bona fide* loans of money, *eight per cent.*

<sup>4</sup> In several, excepted townships, *seven per cent.*

<sup>5</sup> Negotiable paper in *bona fide* hands not affected, and agents of parties residing out of the State may retain *seven per cent.* on balances in their hands.

<sup>6</sup> By agreement, as high as *twelve per cent.*

<sup>7</sup> By agreement, as high as *ten per cent.*

<sup>8</sup> Party paying usury may recover back *treble* amount of excess.

# HISTORY OF USURY.

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## CHAPTER I.

### INTOLERANCE AGAINST USURY.

IN tracing the history of Usury, we cannot fail to observe how inconsistent and intolerant have been the popular manifestations of feeling, in almost every age and every civilized country, towards usury and usurers; nor without an enduring interest peruse the many severe and "*penall lawes*" upon the subject, which this prevailing spirit had called into existence and spread upon the statute books, for they furnish the text to a singular commentary upon the opinions that obtained at the several periods of their enactment. Thus we see in some the practice of usury marked by a spirit of intemperate dislike, and recited as one of the "*foulest offences against God and man*," and prescribing a punishment of rigorous severity

accordingly; while in others it is urged that usury is a “*concessum propter duritatem cordis*,” and must be permitted freely. We shall see, however, that this great change of opinion was gradual and progressive, and excellently serves to show how slowly our fore-fathers became converts to the “doctrine of loans upon interest.”

Many of the writers on the subject record the prejudices of their times in the most violent language, and take pains to tell us that those who practised usury were very justly pointed at and abhorred, because connected with the devil, their persons shunned, their vicinity detested, and their residences called the devil’s vineyard. Some writers have even gone so far as to place usury in the same table with the crime of murder. Cicero says, that when Cato was questioned on the subject, his only reply was, “what is murder?” *Cum ille, qui quæsicerat dixisset quid faenerari? tum Cato, quid hominem (inquit) occidere?*<sup>1</sup> And Dr. Wilson,<sup>2</sup> in his “discourse upon usurie,” says, “I will wish some penall lawe of death to bee made against those usurers, as well as against theeves or murtherers, for that they deserve death much more than such men doe; for these usurers destroie and devour up not onlie whole families, but also whole countries, and bring all folke to beggerie that have to doe with them.” And again, as late as the

<sup>1</sup> Cic. de off. lib. 2, in fine (c. 25).

<sup>2</sup> Thomas Wilson, D.C.L., was one of the masters of the Court of Requests, and wrote in the reign of Elizabeth. His famous “Discourse upon Usurie, by way of Dialogue,” appeared in 1569.

reign of James I., we find Mr. Noy<sup>1</sup> was of the same opinion with Dr. Wilson, and thought that the guilt of taking another man's money was equal to that of taking another's life, and asserted in solemn argument before the Court, that "according to an ancient book in the Exchequer, called *Magister et Tilburiensis*, usurers are well ranked amongst murderers."<sup>2</sup> And so as we shall hereafter see, usury has been in almost every age the invariable theme of censure to the moralist, of persecution to the Statesman, and of eternal reprobation to the divine.

The word usury derives its Etymology from *usus*, to use, and *aera*, a mark upon money to show its value. *Usura* dicitur ab *usu* et *aere* quia datur, *pro usu aera*, for the use of money, as though it were *usuæra*.<sup>3</sup> It is not, however, to be hence understood that usury is only applicable to pecuniary transactions. For as it is properly defined as the taking of an extravagant interest for the forbearance of the principal;<sup>4</sup> so the taking for use of other things comes within this explanation of usury.<sup>5</sup> "For if a woman should lend her neighbour two egges, to have three againe, were it not damnable usurie!"<sup>6</sup> The majority of our Etymologists make *interest* and *usury* synonymous; and the enemies to interest in general make no distinction between that and usury, holding that any increase of money is indefensibly usurious;

<sup>1</sup> *Attorney-General, vid. Comyn.*

<sup>2</sup> *Roll. Rep.*, 240.

<sup>3</sup> *3 Inst.* 151, c. 78.

<sup>4</sup> *2 Inst.* 89.

<sup>5</sup> *3 Inst.* 151.

<sup>6</sup> *Fenton.*

but the Statute and Common Laws have correctly distinguished between these, implying that the latter is *exorbitant*, and the former is *lawful*. By some authors the word usurer has been applied to those who have committed any kind of extortion or wrong upon another; but this application is incorrect.

Usury is defined by Sir Edward Coke, as “a contract upon a loan of money, or giving days for forbearing money, debt or duty, by way of loan, chevisance, sales of wares, or any other things whatever,” and may be stated in other words to mean the letting out or lending of one’s property of any kind or description to others, and taking or contracting for an *exorbitant* return, profit or reward for the forbearance of such property or loan. And it seems to have been in this sense of the term, which places usury in the light of oppression and extortion, that the ideas and opinions of men concerning its sinfulness were conceived, and handed down from a remote period of Christianity through succeeding ages, to the present century.

Interest, on the other hand, is differently and well defined as “a certain, fair, and legal profit, which the lender is to have for the use of the thing loaned.”<sup>1</sup> Thus interest and usury are essentially different; but as we proceed with our inquiry, and come to examine into what has been said and done in former times by divines, moralists, and legislators, we shall

<sup>1</sup> “Usura est comodum certum quod propter usum rei mutuatae recipitur.”—(5 *Rep.*, 70.)

be led to the conclusion that no subject within the scope of Ethics ever displayed such glaring discrepancies in theory and practice as usury.

The practice of taking interest, or usury, upon loans, is of great antiquity, as is evident from many passages in the Scriptures; but in the very beginning a horror of the crime was instilled into the minds of men by the prohibition contained in the law of Moses.<sup>1</sup> This law, however, upon a comparison with other texts, would seem to have been more political in its purpose than moral in its object, and to have sprung from the "union of Church and State"—the compound of spiritual and civil government of which Moses was the head—and was framed to meet its necessities, and was peculiarly adapted to its institutions. But on the death of our Saviour, no part of the Jewish law was binding upon the conscience of any of mankind, that was not equally so before the law came to Moses. For by the divine event of our Saviour's crucifixion, the whole of that system was fulfilled and put an end to, and its injunctions were no longer obligatory upon any of mankind—"unless, perhaps, upon such of the Jewish nation as continued to live under the civil form of government, to which the masonic rites, ceremonies, and ordinances were alone adapted."<sup>2</sup> This portion

<sup>1</sup> "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury: unto a stranger thou mayest lend upon usury, but unto thy brother thou shalt not lend upon usury."—(*Deut. xxiii., 19, 20.*)

<sup>2</sup> *Plow. on Usury*, p. 11.

of the Jews, then, transmitted through the epoch succeeding our Saviour's death, many of the precepts they had received in their law ; and primitive injunctions and ideas in regard to usury, were handed down among the rest. These latter, for reasons which we shall presently see, particularly received the sanction of popular opinion, and were afterwards applied, however incorrectly and illy suited, to other systems, widely differing from that for which the law was originally designed.

It has been contended for by many learned writers on the subject of usury, that by the Jewish law it was "sinful in the sight of God" for any Jew to take any increase or interest whatever, even the most moderate, for that which he had lent another Jew ; and to support their arguments they quote the prohibition from Leviticus : "Thou shalt not lend upon usury to thy brother. Take thou no usury of him or increase, but fear thy God, that thy brother may live with thee. Thou shalt not give him thy money upon usury, nor lend him thy victuals for increase."<sup>1</sup> Also from Deuteronomy : "Thou shalt take no usury of thy brother,"<sup>2</sup> and other texts from the Scriptures, where usury is forbidden to the Jews in their dealings with one another.<sup>3</sup>

In answer to this, it may be said, in the language

<sup>1</sup> *Deut. xxv., 36-37.*

<sup>2</sup> *Deut. xxiii., 19.*

<sup>3</sup> "If thou lend money to any of my people that is poor by thee, thou shalt not be to him as an usurer, neither shalt thou lay upon him usury."—(*Exodus xxii., 25.*)

And so David sang : "Lord, who shall dwell in thy tabernacle ?

of a learned commentator on the sacred volume,<sup>1</sup> that these injunctions were only intended to impress upon the wealthier Jews the necessity of kindness and benevolence towards the poor of their own nation. And Milman<sup>2</sup> informs us that the Talmud allows interest to be taken from brethren as well as strangers, but forbids usury; and the Mosaic institute, which was the law of an agricultural people, forbids only unlawful interest. But even if it was as the writers first alluded to have contended, it may be urged, that though the Jews were thus enjoined from taking usury of their *brethren*, yet they were expressly permitted to take it of a stranger.<sup>3</sup> And then we have an inconsistency not easily reconciled, or the assurance that the Mosaical prohibition was not a purely moral precept of universal obligation upon mankind.<sup>4</sup> For if the taking of interest was *malum in se*, it could not have been permitted under any circumstances whatever; and we are therefore left to infer that the taking of usury was not contrary to those moral precepts or natural law which existed before, and survived the legislation of Moses. And that even under the Mosaical law, as Milman

or who shall rest upon thy holy hill? \* \* \* He that hath not given his money upon usury, nor taken reward against the innocent."—*(Psalms xv., 1-5.)*

<sup>1</sup> Lewis.

<sup>2</sup> *Mill. Hist. Jews*, Vol. iii., p. 407.

<sup>3</sup> "Unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury."—*(Deut. xxiii., 26.)*

The "strangers" here spoken of, were the Canaanites and neighboring tribes.

<sup>4</sup> *Pal. Mor. and Polit. Phil.*, Vol. 2., book 3., c. 10.

informs us, a loan upon interest could lawfully be made from one Jew to another; and that the offence contemplated by the law, was the oppression of the already needy borrower: so that where there was no oppression, there was no sin of usury, even under the law of Moses.<sup>1</sup>

This view is certainly sustained by passages occurring in the New Testament,<sup>2</sup> which distinctly inform us that there were bankers or brokers in Jerusalem, who carried on a trade in money, and borrowed or took in money at interest; and it was of them our Saviour spoke in the parable of the ten pieces of money.<sup>3</sup> Now it is not likely that the divine law-giver would make a sinful practice the medium of instructions in his heavenly precepts; and we may therefore safely conclude, that there were lawful

<sup>1</sup> The Mosaic law contains three statutes on the subject of interest. In the first, interest is forbidden to be taken of *poor* Israelites only: “*If thou lend money to any of my people that is poor by thee, thou shalt not lay usury upon him.*”\* In the second, the reference is still to the poor and needy: “*And if thy brother be waxen poor and fallen into decay thou shalt relieve him, but take thou no usury of him or increase.*”† And hence Michaelis argues that interest was permitted to be taken of an opulent Jew, but that in consequence of the laws being evaded, interest was totally prohibited in the fortieth year after the Exodus,‡ by the third statute § of Moses.

<sup>2</sup> Usury is nowhere forbidden in the New Testament.

<sup>3</sup> “*Matthew xxv., 27.—“Thou oughtest therefore to have put my money to the exchangers, and then at my coming I should have received mine own with usury.”—(Et vide, Luke xix., 22.)*

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\* *Exodus xx., 24.*

† *Leviticus xxv., 35.*

‡ *Commentaries on the Laws of Moses.* § *Deut. xxiii., 20, 21.*

methods, recognized and in use among the Jews, of placing out money at interest, for increase or profit, which were not inconsistent with the Mosaical law. But we have also the testimony of St. Thomas Aquinas<sup>1</sup> and Calvin, the latter of whom declared that he knew of no Scriptural authority by which usury was wholly condemned. “*Nullo testimonio,*” says he, “*Scripturæ mihi constat usuras omnino damnatus esse.*”<sup>2</sup> And many other learned and pious men were of opinion that usury was only unlawful, even among the Jews, when coupled with extortion or oppression.<sup>3</sup>

To return, however, to the other point: How are we to account for the distinction between the Jew and the Gentile—the prohibition to take usury from the former, and the express permission to take it from the latter? St. Ambrose, in discussing it, seems to think that it was confided to the Jews as an instrument of vengeance, to be used against their enemies, and says: “Take usury from him whom you may lawfully kill: whenever, therefore, you have a right to wage war, you have a right to take usury. *Ab hoc usuram exige, quem non fit crimen,*

<sup>1</sup> *St. Thomas Aquinas, Op. de Us., c. 4.* <sup>2</sup> *Calv. Epis., de Us.*

<sup>3</sup> Among the twelve questions submitted to the Grand Sanhedrim of the Jews, summoned at Paris by Napoleon, in 1806, were these: “*Is usury to their brethren forbidden?*” and “*Is it permitted, or forbidden, to practice usury with strangers?*” Which were answered: “That the Mosaic Institute forbids unlawful interest;” but this was the law of an agricultural people. The Talmud allows interest to be taken from brethren and strangers, but forbids usury. —(*Mill. Hist. of Jews, Vol. iii., p. 407.*)

*occidere.* Ergo ubi jus belli ibi, etiam jus usuræ.”<sup>1</sup> And Sir Edward Coke, in speaking of this same text, describes it as a “mean confided to the Jews either to exterminate or depauperate their enemies, so that they should not be able to invade or injure God’s people.”<sup>2</sup>

To these interpretations, however, we cannot assent, for they are opposed to the spirit of the injunctions addressed to the Jews in the New Testament: “Love ye your enemies, and lend hoping for nothing again, and your reward shall be great.”<sup>3</sup> And elsewhere in the Scriptures we find the text in question explained to mean a blessing and reward which God bestowed upon his chosen people, for their temporal advantage. “For the Lord thy God blesseth thee, as he promiseth thee; and thou shalt lend unto many nations, but thou shalt not borrow.”<sup>4</sup> The “strangers” alluded to in the text were the Canaanites, and those neighboring tribes with whom the Jews might trade for their mutual advantage, and the permission to take usury of them was not a mere instrument of vengeance, as Sir Edward Coke has supposed, to be used against them; while on the other hand the loans which were permitted to be made “unto many nations,” were not, as the enemies of interest have contended, to be made without interest or profit; for then they would not be a

<sup>1</sup> *Lib. de Tob.*, c. 15.

<sup>2</sup> *3 Inst.*, 151.

<sup>3</sup> *Matthew*, 42. *Luke* vi., 35.

<sup>4</sup> *Deut.* xv., 6: *Ib.* xxviii., 12, 44.

“blessing and reward” to the Jews, but a detriment and loss; and all the advantage would have been on the side of the borrowers. Therefore these prohibitions, blessings, and promises, can only be explained by the doctrine of loans upon interest.

The concurrent condemnation of usury by nearly every nation in Christendom is mainly owing to the general and violent denunciation, by the fathers and clergy of the ancient churches,<sup>1</sup> who in those ages of darkness and superstition, held almost absolute influence over the opinions of the mass. They had monopolized all the learning of the times within their own body, and it was natural that general submission should be paid by the ignorant to the opinions propagated by the learned; especially as such teachings were instilled into the minds of the youth, and grew with them, so it followed that this clerical influence found its way into the Senate Chamber, and stamped the proceedings there with the bigotry of the period. An exception, however, to this general rule must be made in favor of Greece, which had no laws on the subject, as we shall presently see; but in less enlightened countries the rule is literally true. But the every-day necessities of men always required facilities to borrow, and the acquisitive elements of human nature would not

<sup>1</sup> It was ranked with heresy, schism, incest, and adultery—sentence of excommunication was to be denounced by a Bishop, or Prebendary at least; *Canones synodi*—(London, A.D., 1584, c. 4.)

“Yea, with the Thunderbolt of excommunication, to terrify such as do wilfully defend usurie.”—(*Rogers on Usury*, A.D., 1578.)

afford these without reward. To this the Clergy were always opposed; and thus both in the ancient and more modern laws on the subject, we find the prejudices contending with the necessities of the times, producing results strangely inconsistent. In some of these laws we may see, that to satisfy the former, usury is declared a detestable sin, *contra jus humanum et divinum*, and to meet the latter, sanctions the thing itself under certain restrictions.

An argument formerly much urged by the reverend Fathers, and indeed by all the writers against usury, was that it was unlawful in point of conscience, because contrary to natural law—speaking of which Blackstone quaintly observes that “many good and learned men have in former times very much *perplexed themselves and other people*, by raising doubts about its legality *in foro conscientiæ*;”<sup>1</sup> the objections being founded upon the proposition attributed to Aristotle: that money being naturally barren, to make it breed money is preposterous, and a monstrous perversion from the end of its institution, which was only to serve the purposes of exchange and not of increase.<sup>2</sup> St. Bazil, bishop of Cæsarea, a learned and influential churchman of the fourth century, took up this doctrine, and discoursed with pious horror of the unnatural fertility of money when put out at interest. “Brought and bringing fourth [said he] on the same day, though not gifted by the God of nature with

<sup>1</sup> *Blk. Com.* II., p. 454.

<sup>2</sup> This is believed to be spurious.—(*Blk. Com.* II., p. 450.)

genitive or procreative faculties.” And so the argument continued to be quoted by all the enemies of usury in all countries and times down to the beginning of the seventeenth century, when the expiring embers of prejudice were sought to be fanned again into flame by the inveterate enemy of interest, John Blaxton.<sup>1</sup> “There are [said he] in his ‘English Usurer,’ infinite colours, mitigations, evasions and distinctions invented on earth to cover heaven-exploded usury ; nay, the tired earth becomes barren, only the usurers’ money the longer it breeds, the lustier ; and an hundred pounds put out twenty years since, is grandmother to two or three hundred children, pretty strippings, able to begette their mother againe in a short time.”

In answer to these objections it may be said : that money begets not money is a weak argument, for the gain that is raised out of anything is not always the same thing, nor the fruit of the same thing, but rather of his skill and industry that employs it.<sup>2</sup> And Blackstone observes as to the natural barrenness of money, that “the same may with equal force be alleged of houses which never breed houses ; and twenty other things which nobody doubts it is lawful

<sup>1</sup> To this author we are also indebted for the following portrait of the usurer’s person : “The usurer,” he says, “is known by his very looks often, by his speeches commonly, by his actions ever ; he hath a leane cheeke, a meagre body, as if he were fed by the devill’s allowance, his eyes are almost sunke to the backside of his head with admiration of money, his eares are set to tell the clocke, his whole carcass is a meere anatomy.”

<sup>2</sup> *Ex. of Neshech.*

to make profit of by letting them to hire. And though money was originally used for the purposes of exchange, yet the laws of any State may well be justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it.”<sup>1</sup> And in a later work<sup>2</sup> the fallacy of this famous doctrine, and the arguments based upon it, are ably exposed and refuted.

When Solon, one of the seven sages of Greece, was called to give laws to the Athenians,<sup>3</sup> he placed no restrictions upon trade in money, but allowed them to regulate the rate of interest by their own contracts.<sup>4</sup> Athens, at that time, was in a state of absolute anarchy, and it was hoped by the majority, that he would effect a new division of lands, and establish an equality of wealth, as Lycurgus had done at Sparta; but the influence of Solon, in Attica, fell far short of that which Lycurgus had acquired in Lacedaemonia, and he durst go no further than to declare all debtors discharged and acquitted of all their debts, whereby the poor citizens, whose excessive debts and accumulated arrears had forced them to sell their persons and liberty, and reduce themselves to a state

<sup>1</sup> *Bl. Com. II*, 454.

<sup>2</sup> *Bentham's Def. of Us.*, 101.

<sup>3</sup> *Ante, J. C.*, 559.

<sup>4</sup> *Plut. in Solon*, 87. “It is a glorious monument of the enlightened and commercial character of Greece, that she had no laws on the subject of usury; that her trade in money, like the trade in everything else, was left wholly without legal restriction.”—(*Boek. Econ. of Athens.*)

of servitude and bondage, were restored to at least their freedom. With this, the rich were at first disgusted, and the poor dissatisfied ; but in a little while afterwards the ordinance was generally approved. And when Solon was asked by Croesus, king of Lydia, if the laws which he had made for the Athenians were the best that could be given them, he said : “ *Yes ; the best they were capable of receiving.*”

Usury was held, however, in extreme abhorrence ; but it does not appear that Aristotle’s notable doctrine ever had any influence in Greece, for money rose in value, though it seldom exceeded twelve per cent. in ordinary loans, and eighteen per cent. in commercial affairs ; and this was deemed in most instances a fair profit. The rate of compensation, however, was, in all cases, measured by the degree of risk which the lender ran of losing his goods ; and where he exacted more than would reasonably remunerate him for this, he was punished as a thief, compelled to make restitution, and held thenceforth in contempt.

This toleration is more surprising, when we remember that the Greek Fathers, and all the priesthood, were particularly bitter in their denunciations of usurers. St. Basil was the foremost of these crusaders against usurers, and entered with detail and vigor upon the subject. He attempted to excite a disgust of the usurer, by portraying his lying and hypocrisy in the most exaggerated language. “ The gripping usurer,” said he, “ sees, unmoved, his necessi-

tous borrower at his feet, condescending to every humiliation, professing everything that is villifying; he feels no compassion for his fellow-creature, though reduced to this abject state of supplication; he yields not to his humble prayer; he is inexorable to his entreaties; he melts not at his tears; he swears and protests that he has no money, and that he is under necessity of borrowing himself; he acquires credit to his lies by superadding an oath, and aggravates his inhuman and iniquitous traffic with the grossest perjury. But when the wretched suppliant enters upon the terms of the loan, his countenance is changed; he smiles with complacency; he reminds him of his intimacy with his father, and treats him with the most flattering cordiality. ‘Let me see,’ says he, ‘if I have not some little cash in store, for I ought to have some belonging to a friend—*who lent it to me upon very hard terms*—to whom I pay most exorbitant interest for it; but I shall not demand anything like that from you.’ By fair words and promises, he seduces and completely entangles him in his snares; he then gets his hand to paper, and completes his wretchedness. How so? By dismissing him bereft of liberty.” And after this highly-colored picture of falsehood and oppression, he continues to rail against usurers in the bitterest terms, and caps the climax of his discourse by calling them dogs, monsters, vipers, and devils. He then proceeds to advise any sacrifice, rather than borrow money upon usury. “Sell thy cattle,” says he, “thy plate, thy

household stuff, thine apparel ; sell anything, rather than thy liberty : never fall under the slavery of that monster, usury."

St. Gregory Nazianzen, Bishop of Constantinople, who was contemporary with St. Bazil, together with many other of the Greek Fathers, wrote and preached in similar terms. It is remarkable, however, that although some of these writers have entered very fully into the subject of usury, they have nowhere exactly defined what, in their ideas, constitutes the offence of usury ; but as they all seem to reflect upon it, principally on the ground of its inhumanity, we may infer that that usury which they denounced, was always an act of oppression or cruelty.

Among the Romans, twelve per cent. was the rate established by the Decemvirs, who compiled the laws of the Twelve Tables. In Rome, interest was payable every month, and was one per cent. ; hence it was called *usura centesima*, because in a hundred months it doubled the capital ; so, in reckoning the twelve months, twelve per cent. was paid. This law was afterwards abolished, and interest laid under a total interdict ; it was subsequently revived, however, by the Tribunes of the People, in the 369th year of Rome. Ten years after, interest was reduced to half that sum ; but in the 411th year of Rome, all interest was prohibited by decree : " *Nam primo duodecim tabulis sancitum, ne quis emciario fænore amplius exerceret, cum antea ex libidine locupletium,*

*agitaretur: dein rogatione tribuniciā ad se memrias redacta: postremo vetita usura.”<sup>1</sup>*

Usury now walked abroad in its worst form; and, according to Tacitus, these laws forbidding it were continually eluded: “*Totius repressae*,” says he, “*miras per artes rursum oriebantur.*”<sup>2</sup> And from this period, when usury lorded among them, Rome dates the beginning of her decay.<sup>3</sup> Trade was embarrassed, became disreputable, and fell into the hands of the most vicious of the community, and prepared the way for the subsequent calamitous events which then followed in quick succession.

Afterwards, however, in the time of Justinian, interest again came to be legally recognized, and was fixed at the third of one per cent. monthly, which amounted to four per cent. per annum, though higher interest was allowed to be taken of merchants, because there the risk was greater.

Among the Romans, usury was treated, during most periods of their history, as an aggravated species of theft, and was punished with the utmost severity. The punishment of theft was only a forfeiture of double the value of the thing stolen; whereas in usury, the criminal was punished by condemnation, and forfeiture of four times the value of the usury taken: “*Majores nostri sic habuerunt, et ita legibus posuerunt, furem dupli condemnari foener.*

<sup>1</sup> *Tac. Annal.*, lib. 6, c. 4.

<sup>2</sup> *Tac. Annal.*, lib. 6.

<sup>3</sup> *Dr. Thomas Wilson—Dis. on Usury.*

*atorem quadrupli.*<sup>1</sup> And the law in this respect, seems to have been grounded on reasons of state; for, it is said, that usury was one of the most frequent causes of sedition and discord among them: “*Sane vetus urbi foenebre malum: et seditionum, discordiarumque creberrima causa.*<sup>2</sup>” And Cato,<sup>3</sup> Seneca, and Plutarch inveighed against it, both at the Bar and in the Senate Chamber; and Cicero tells us in what abhorrence it was held at Rome in his day: “*Impabantur ii questus qui in odia hominum incurruunt, ut foeneratorum.*<sup>4</sup>”

The Latin Fathers of the holy Church, and most of the clergy preached with bitterness against usury, but were for the most part explicit in declaring the sin to consist only in an act of oppression; and St. Ambrose was particular in charging the whole offence to the cruelty of the usurer. A century later, St. Augustine, Bishop of Hippo, who also wrote and preached on the subject, though very severe, explained that he meant only *oppressive* usury: for, said he, an act of oppression is contrary to the laws of humanity and the spirit of equity, and can never be too severely condemned. Leo the Great<sup>5</sup> and others followed, and thus the Fathers of the Christian Church kept alive the popular feelings against usury until St. Bernard’s<sup>6</sup> time, when this illustrious Abbot,

<sup>1</sup> *Marc. Cato, de re rustica.*

<sup>2</sup> *Tac. An.*, lib. 6, c. 4.

<sup>3</sup> For the opinion of Cato, respecting usury, see *Ante*, p. 12.

<sup>4</sup> *Cic. de Off.*, lib., c. 42.

<sup>5</sup> *A. D.*, 440.

<sup>6</sup> St. Bernard was a most learned and pious Abbot of the monastery of Clairvoux, in the 12th century, and his opinions obtained great respect.

by means of his spirited eloquence, gave a new impetus to the already ample horror against usury. He applied expressions of extreme disgust dressed in the most powerful language, and declared that usurers or extortioners were worse than Jews, and called them Jews baptized. “*Taceo quod sicubi; desunt Judæi [says he], pejus judaizare dolemus Christianos fœneratores. Si tamen Christianos et non magis baptizatos Judæos, convenit appellare.*”<sup>1</sup> After his time came Pope Alexander III., and many other influential characters, who held the same opinions on the subject of usury; and it is, therefore, no matter for surprise, that succeeding divines should have followed the example of those great authorities, and have emulated each other in the point and bitterness of their invectives against usurers.

In the fifteenth century appeared the great Gerson, the most eminent and learned divine of his day, who, to enlarged and liberal ideas, added great learning, and wrote and spoke on the subject of usury with eloquence, moderation and fairness. He entered very fully upon the theme, and after discussing it in all its bearings, expressly stated his conclusion that all interest beyond the principal loaned, was *not* prohibited by the law of God, but only *oppressive* usury. He said that the very meaning of the term “usury,” seemed to be generally misunderstood and misapplied, not only by the vulgar, but by the scholars and statesmen, and explained that usury was only pro-

<sup>1</sup> *Epist. de St. Bernard, 322.*

perly so called when a greater increase was taken for the forbearance of the principal than was fixed by law.<sup>1</sup> He seems also to have been of opinion that the regulation of the rate of interest or increase upon a loan, was a matter that did not properly rest with the Church; and that if it belonged anywhere, other than to the parties themselves, it belonged to the State.<sup>2</sup>

The most eminent of the reformers enters with spirit and zeal upon the subject of usury, and severely condemn its practice; but it seems that by usury they always meant an act of oppression or extortion. Thus Calvin, though he said that it were to be wished that the very name of usury were banished from the world, expressed a decided opinion in favor of the lawfulness of usury; and added with great justice, that we should not form our opinions upon usury from any particular passage in Scripture, but rather suffer our ideas to be governed by the equity. "*Judicandum de usuris esse non ex particulari aliquo scriptura loco, sed tantum ex equitalis regula.*"<sup>3</sup> Melancthon, Beza, Musculus and others were of this opinion.

The See of Rome still endeavored to keep up the ancient prejudices against usury; and Pope Alexander the VIIth, in 1660, and Innocent the XIth, in 1679, stood foremost among the crusaders against this "horrible and damnable sinne;" but their discourses

<sup>1</sup> *Gers. de Contr.*, p. 1., *Conf.* 16.

<sup>2</sup> *Id.*, *Con.* 19.

<sup>3</sup> *Epist. de Usura.*

and writings threw no new light on the subject, and gained little attention. At this period too, when commerce was firmly established, and its importance acknowledged by all, few would give heed to opinions which threatened to stand in the way of its advancement, and thus the "*inseparable companion of commerce*," as Blackstone calls the doctrine of loans upon interest, rapidly grew into credit, and became a necessary part of the commercial system. Half a century later, interest received the sanction of Pope Benedict the XIVth, who, in 1730, addressed a brief to the subjects of his own states, in which he, in effect, disclaimed the right of the Church to interfere on the subject of usury, allowed the practice, and settled the rate of interest. It seems, however, that under certain restrictions, loans of money and other things for interest or hire, had been negotiated throughout every state in Italy, including the Papal dominions, since early in the 12th century;<sup>1</sup> but the practice does not appear to have been openly recognized.

<sup>1</sup> *Gibbon.*

## CHAPTER II.

### IN ENGLAND.

IN England as early as the reign of Alfred, penal laws were enacted against usury.<sup>1</sup> By those laws it was enacted that the chattels of usurers should be forfeited to the king, their lands escheat to the lords of the fee, and they should not be buried in the sanctuary.<sup>2</sup> A century and a half later, in the reign of Edward the Confessor, the severity of the law of Alfred was improved upon, and the statute then directed that the usurer should forfeit all his substance, should be outlawed, and his heir disinherited.<sup>3</sup> William the Conqueror afterwards added other punishments, such as whipping, exposure on the pillory, and perpetual banishment. But these statutes were much modified in subsequent reigns, and in the time of Henry the Second (12th century), according to Glanville,<sup>4</sup> the usurer was not liable to be convicted during his lifetime, and only forfeited his goods and chattels after death; and that even after he had been convicted of usury he was permitted to expiate his crime by penitence, and so discharge himself from

<sup>1</sup> 2 *Roll. Abr.*, 800.

<sup>2</sup> 2 *Roll. Abr.*, 800. *Et Grot.*

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<sup>2</sup> 3 *Inst.* 151.

<sup>4</sup> *Glanv.*, lib. 7, c. 16.

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those forfeitures to which his goods and chattels were otherwise liable at his death.<sup>1</sup>

In the twentieth year of the reign of Henry III., A. D. 1235, was passed the Statute of Merton,<sup>2</sup> the first statute in which the word usury occurs. It was then enacted, that “from thenceforth usury should not run against any being within age, from the time of the death of his ancestor (whose heir he was) unto his lawful age.” The real object of this statute seems to have given rise to much difference of opinion among the schoolmen, and Sir Edward Coke, in speaking of it, said it was very diversely expounded by them<sup>3</sup>; some having supposed that it was only made against the usurious Jews that were then in England, and could only have reference to Jewish usury,<sup>4</sup> because, say they, at that time and before the

<sup>1</sup> “Usurarii vero omnes res (sive testatus, sive intestatus decesserit) domini regis sunt vivus autem non solet aliquis de criminis appellari, nec convinci. Sed, inter cæteras regias inquisitiones, solet inquiri et probari aliquem in tali criminis decessisse, per duodecim legales homines de vicineto, et per eorum sacramentum. Quo probato in curia, omnes res mobiles, et omnia cataalla, quæ fuerunt ipsius usurarii mortui, ad usus domini regis capientur, penes quemcunque inveniuntur res illæ. Hæres quoque ipsius, hac eadem de causa, exheredatur, secundum jus regni, et ad dominum vel dominos revertetur hæreditas. Sciendum tamen, quod si quis aliquo tempore usurarius fuerit in vita sua, et super hoc in patria publice defamatus, si tamen a delicto ipso ante mortem suam destiterit, et penetentiam egerit, post mortem ipsius, ille vel res ejus lege usurarii minime censemuntur. Oportet ergo constare, quod usurarius decesserit aliquis, ad hoc, ut de eo, tanquam de usurario post mortem ipsius judicetur, et de rebus ipsius, tanquam de rebus usurarii, disponatur.”—(*Glanv.*, lib. 7., c. 16.)

<sup>2</sup> 20 *Henry III.*, c. 5.

<sup>3</sup> 2 *Inst.*, 89.

<sup>4</sup> Jewish usury was forty per cent.—(3 *Inst.* 152, *et 2 Roll.*

conquest also, it was not lawful for Christians to take any usury whatever.<sup>1</sup>

It is true that the Jews chiefly carried on the trade in money; but they were not wholly without competitors in the lucrative business of usury; for there was a company of Italians in London, at this period, who called themselves "merchant strangers,"<sup>2</sup> and who were the agents for the Pope in collecting his revenue in England. This company exacted four hundred and fifty per cent. per annum for the money they lent, and were guilty of the most cruel oppression. They evaded the law by charging nothing for the first three months, and then covenanted to receive *fifty per cent.* for every month afterwards that it should remain unpaid,<sup>3</sup> and said they were no usurers, for they lent their money absolutely without interest, and what they were to receive afterwards

*Abr.*, 800.) We find that the Jews were restrained by an order of Henry III., A. D. 1272, on the petition of the poor scholars at Oxford, whose books they held in pawn, from taking more than two pence in the week for every twenty shillings they lent them for the future, which is more than forty-three per cent.—(*Hume's, Eng.*, 2 vol., p. 225.) And in the account of the massacre of the Jews in 1262, we are informed that it was "because one Jew had wounded a Christian man within Colechurch in London, and would have enforced him to have paid more than two pence for the usury of 20s. for one week."—(*Stow, Cron., Henry III.*, 192.)

"Letters patent of the French King John, bearing date 1360, are extant, authorizing the Jews to lend in pledge at the rate of four *deniers* per week for every *livre* of twenty *sous*, which is more than eighty-six per cent."—(*Say, Polit. Econ.*, 301.)

<sup>1</sup> See *Plowden on Usury*, 125, where it is endeavored to prove that the statute of *Merton* could only relate to the Jews.

<sup>2</sup> *Hume's Essay on Int.*

<sup>3</sup> *Hume.*

was a contingency that might be defeated.<sup>1</sup> They lived in security, and were not kept in perpetual dread of being plundered as the Jews were, being themselves Christians; and, moreover, being employed by the head of the Christian church, their extortions were the more scandalous in the eyes of the people; and writers of the time complain that the Pope, by means of the Caursini,<sup>2</sup> was as bad as the Jews.

At length so grossly oppressive were their extortions that they drew down upon themselves the censures of the English clergy; and Roger, the then Bishop of London, having in vain admonished them to desist from their oppressions, excommunicated them A. D. 1235. But through the Pope's protection, and their interest at Rome, they shortly afterwards caused the Bishop to be cited there to answer for his conduct, which induced the suspicion that the Pope was both their accomplice and partner in their spoils.<sup>3</sup>

<sup>1</sup> When the Jews came to understand this Christian mode of preventing usury, says Matthew Paris, they laughed very heartily.—(*Matt. Paris*, 286.)

<sup>2</sup> Milman, in his history of the Jews, calls them “*Caorsini*” from the town of *Cahors* in France. *Matt. Pairs, Hollingshed, and Stow*, “*Caursini*.” *Du Change*, “*Caorcini*,” who believes they belonged to an ancient family of that name in Italy. While *Mallynes*, in his *Lex Mercatoria*, calls them *Cursini*, and says they were Italian bankers.

<sup>3</sup> “*Pestis Abominanda*,” says M. Paris, speaking of the *Caursini*, and tells us that the Bishop, who was old and infirm, applied to his patron, Paul, for advice, who not only approved of what he had done, but added: “*Ex si Angelus vobis his contraria prædicaverit, anathema sit.*”—(*Matt. Paris*, p. 418.)

But to return to the Statute of Merton. Sir Edward Coke<sup>1</sup> said, and his exposition is the best, that the usury intended by the statute was not unlawful, for the usury due before the death of the ancestor is enacted to be paid after the full age of the heir, and no usury was then permitted, but by the Jews only. That the statute was intended to apply to those cases where penalties were reserved for default in the payment of a debt (which in the extensive sense in which the word was sometimes used, was called usury), and had for its object the protection of persons who were within age, and to whom no default could be attributed. “As where the king gave land to another, reserving a rent payable at a feast certain, and in default of payment, that he should double the rent for every default; and afterwards the grantee died, leaving an infant heir, he should not be charged with double rent, and is liberated from the penalty by reason of his non age.”<sup>2</sup> This kind of usury, remarks Mr. Ord,<sup>3</sup> materially differed from what was strictly and legally so called. It was not unlawful to reserve a penalty for non-payment of a debt, or rent, and if default was made, such penalty might be recovered by legal means; and this kind of usury is considered by the statute as lawful, the statute having provided that the “principal debt with the usury which was before the death of his ancestor should not remain.” And the statute

<sup>1</sup> *Co. Lit.*, 246.

<sup>2</sup> *Coke on Lit.*, 247.

<sup>3</sup> *Ord on Usury*, p. 12.

does not fix any penalty upon those who act contrary to it, nor does it contain any of those terms of opprobrium, with which usury was described by the Legislature and Judges, when they contemplated it in its legal sense. On the contrary, usury, in its strict legal sense, was always considered as unlawful; and the payment of the usury, or interest, could not be enforced by a legal remedy; <sup>1</sup> for even at common law, an action on an usurious contract could not be supported.

In the following reign <sup>2</sup> usury was made an indictable offence before the Justices in Eyre, whose duty it also was to discover the goods of usurers, and declare their forfeiture; and Bracton <sup>3</sup> details some of the horrors inflicted upon the unfortunate usurer, under this system, in his time,

Probably at no period in the History of Usury in England was so much oppression and cruelty practised, as at the time of which we speak. The scandalous and open extortion daily committed by usurers brought upon them the bitterest execrations of the people; their rapacity seemed insatiable, and they enforced their claims with inflexible rigor and boldness, sparing none from the extreme penalty. Even the sacred person of one of the dignitaries of the church was not exempt from molestation. “I am dragged (said Peter of Blois, Archdeacon of Bath,

<sup>1</sup> 2 *Rolle's, Abr.*, 801.

<sup>2</sup> *Edward I.*, A. D. 1272.

<sup>3</sup> Henry de Bracton, a noted English Law writer, of the 13th Century, wrote his well known treatise, “*De Legibus et consuetudinibus Angleæ*,” in the reign of Edward I.

in a letter to the Bishop of Ely) to Canterbury by the perfidious Jews, to be crucified among their other debtors, whom they ruin and torment with usury; the same sufferings also await me in London, if you do not mercifully interpose for my deliverance; I beseech you, therefore, O most reverend father, and most loving friend, to become bound to Sampson, the Jew, for six pounds which I owe him, and thereby deliver me from that Cross.”<sup>1</sup> At length such a clamor was raised against the Jews as to lead to their total expulsion from the kingdom in the eighteenth year of the reign of Edward I., A. D. 1290. The Act of Parliament, for that purpose, commanded them, “under pain of hanging, to depart at a set day: for the effecting and hastening whereof the Commons gave the king a fifteenth.”<sup>2</sup>

However much the people might have congratulated themselves upon thus getting rid of the “Greedy Jews,” the King was suspected of sincerely regretting it, for with their departure ceased the chief source from which his privy purse was most abundantly supplied.<sup>3</sup> Indeed, the Chroniclers did not

<sup>1</sup> *Epist. Paul Blesens*, 156, p. 242. *Kel. on Usury*, p. 8.

<sup>2</sup> *Wm. Prynne, short dem.*, p. 46, cited in *Kelly on Usury*. By reason of this statute the number of Jews, who departed out of the realm, was 15,060.—(2 *Inst.*, 89.)

<sup>3</sup> “In ancient times a great revenue, by reason of the usury of the Jews, came to the crown; for between the 50th year of Henry III. and the 2d year of Edward I., which was not above seven years complete, there was paid into the King’s coffers £420,000 of and for the usury of the Jews; and yet that excellent King, for divers weighty reasons, mostly to be written in letters of gold, did, by authority of Parliament, utterly prohibit the same.”—(2 *Inst.*, 151.)

hesitate to say that the King considered that the fifteenth which the commons granted him was a poor exchange for the “Exchequer of the Jews.” And Perrault quaintly remarks, that “when Edward drove the Jews out of England, he killed the hen that laid the golden eggs.”

The Jews being banished, usury soon found other masters. The Lombards, and other foreigners resident in England, took up the trade and pushed it with vigor, so that, so far as the suppression of the “*sinne of usurie*” was concerned, very little after all had been gained; and, in fact, the most exorbitant and cruel usury was daily and openly practised.

With some of these usurers the Justices in Eyre dealt as required by the Statute; but the clergy interfered, and declared that the Ecclesiastical Courts alone had jurisdiction of usurers, and the right to punish them “for the good of their souls,”<sup>1</sup> according to the laws of the Church — namely, by excommunication<sup>2</sup> — and censures until they made restitution, and to grant them pardon only on condition that forever afterwards they forsook their evil courses. Thus the punishment of usurers by the Justices in Eyre was the subject of several complaints addressed by the clergy to the throne in this and the following reigns, as “an encroachment upon the laws of the

<sup>1</sup> Pro Reformatione morum et pro salute animæ.—(*Roll. Abr.*, tit. Us.)

<sup>2</sup> Yea! with the thunderbolt of excommunication to terrifie such as do wilfully deal in usurie.—(*Rog. on Us.*)

Holy Church and of the land ;" but whatever attention these complaints may have received at the time, nothing was done towards redressing them; and in the fifteenth year of the reign of Edward III. (A. D. 1341), the Archbishop of Canterbury and other powerful Bishops and Clergymen, pressed the complaint<sup>1</sup> to the notice of the King, and demanded that the wrong should be repaired. Upon this a sort of compromise was made, in these words : "that the King and his heirs shall have the cognizance of usurers dead,<sup>2</sup> and the ordinaries of the holy Church the cognizance of them in life, as to them appertaineth, to make compulsion by the censures of the holy Church for the sinne to make restitution of the usuries taken against the laws of the holy Church."<sup>3</sup>

Thus we see that to the influence of the Church are mainly attributable the vigorous measures enforced against the Jews, who chiefly carried on the trade in money. And it has been said that the real cause for the vigilance of the clergy in seeking the usurer, and the animosity they displayed towards him, was that usury was unprofitable to them. "The clergy (says Boulton), who had a chief stroke in making the law, were the more severe against usury because it was unfruitful to them, as they had not tythes of usurers' profits."<sup>4</sup> The blind superstition and bigotry of the period would have been sufficient

<sup>1</sup> *Parl. Roll.*, 15 Edward III.

<sup>2</sup> That his Majesty might take possession of their wealth.

<sup>3</sup> 15 *Edw. III.*, c. 6. *Roll Abr.*, tit. *Us.*, p. 801.

<sup>4</sup> *Bolt. Discourse on Usury*.

to induce the zealous churchmen to persecute and hate all who professed a different faith from themselves; but these feelings were frequently exasperated to fury when the “vile and despised Jew” dared to demand repayment of a loan made to one of these same holy fathers. It seems the licentious monks and clergy were in the habit of pawning the sacred property of the Church to the Jews, for no one but a Jew *dared* to receive the sacred pledge; and that in this way they frequently became odious, not only as importunate creditors, but as exposing, by clamorous and public demands of payment, transactions never meant to meet the light, to the great scandal and mischief to the holy Church, and to the Fathers.<sup>1</sup> And to retaliate this, the most revolting cruelty was practised upon the Jews whenever an opportunity offered, and they were massacred on small pretence.<sup>2</sup> At length, as we have already

<sup>1</sup> *Mil. Hist. Jews*, vol. 4, p. 301.

<sup>2</sup> Matthew Paris, Fabian, Hovenden, Stow, Fox, and many others, inform us that a general massacre of the Jews took place at the coronation of Richard I., merely because a few of the more respectable among them mingled, out of curiosity, with the company that frequented the church on that occasion, and broadly hinted that the mob were instigated to the act by some of the monks and clergy.

In consequence of the unrestrained butchery of the Jews, the King sent his writs throughout all the counties of England, forbidding that any should do harm to the Jews, but that they should be allowed to enjoy their peace. But these proclamations did not produce the desired effect, for Fox informs us (*Acts and Monuments*, vol. I., p. 305), after the Chronicle of Westminster, that there were no less than 1500 of the Jews destroyed in York alone, besides those slaughtered in other places.

seen,<sup>1</sup> they were banished, or, as some contend, freely departed the kingdom, in the eighteenth year of the reign of Edward I. The French clergy carried their measures even still further, and were the means of bringing into existence the most severe law against usurers that is anywhere to be found. The usurer, by the French law, for the first offence was whipped in public and banished; and upon conviction of a second offence, he was hanged.<sup>2</sup>

The Church, however, with all her anathemas and tyrannical exercise of power, was unable to suppress “the horrible and damnable sinne,” as usury was termed;<sup>3</sup> and new punishments were to be devised, besides the “spiritual discipline” before alluded to, and several statutes were passed by Parliament, from time to time, having for their object the total suppression and extirpation of usury. But coercive measures were found ineffectual to suppress it, and, indeed, they gave rise, in some instances, to greater evils than they were meant to remedy; for, by increasing the penalty and the risk to be run (without providing against the borrower’s necessities), the usurer still drove his trade, and gathered strength and ingenuity in proportion as the law opposed its barriers to his practice. He added these increased penalties and risks to the already ample price of

<sup>1</sup> *Ante*, page 42.

<sup>2</sup> *Domat. Civ. Law*, 127

<sup>3</sup> *Horrible et damnable pêche*.—The Church, at common law, held jurisdiction over usurers “for the good of their soules.”—(15 *Edw. I.*, c. 6—*Roll. Abr. tit. Us.*)

his gold—with something more besides, as an indemnity—and thus rendered the usury excessive indeed, and oppressive to the last degree.

In the reign of Henry the VII., several statutes were passed against usury. This prince, whose constant aim was to humble the power and influence of the Pope and clergy in England, at the same time that he was making every effort to extend the privileges of the people, struck a blow at the former, by permitting the lending of money for hire. The 3 *Hen. VII.*, c. 5.,<sup>1</sup> was made principally against “dry exchange,”<sup>2</sup> which was entirely prohibited, as contrary “to the law of natural justice, the common hurt of the land, and the great displeasure of God,” under a penalty of £100, one-half to the king, and the other half to the informer, and subjected the *lender* to the forfeiture of the principal, and the brokers their license, and a fine of £20, and six months imprisonment. So great was the power and influence of the clergy, however, that notwithstanding the jealousy and opposition of the king, this same

<sup>1</sup> A. D., 1488.

<sup>2</sup> “Dry Exchange” was a shift resorted to for evading the usury laws, by means of a bill of exchange, which the borrower drew on an imaginary person at Amsterdam, for instance, and sold it to the lender at the price or rate of exchange for Amsterdam then went at. After the expiration of the time the bill had to run, came a protest from Amsterdam for the non-payment of the bill, with the *re-exchange* of the money thence to London, the bill, in fact, never having been out of the country; and the borrower being thus charged with the *exchange, re-exchange, protest, and incidental expenses*, pays, in all, some 20 or 30 per cent. (—*Plow. on Usury*, 128.)

statute reserved to the Church the right to punish usurers according to the laws of the same—that is, a further fine, imprisonment, and exposure on the “Pillaire, to their open rebuke and shame.” Various new devices were then resorted to, by money-lenders, to cover usury and evade the law, such as fictitious sales of goods, etc., so that it became necessary to counteract these subtleties by another act, which was passed in 1496.<sup>1</sup> By this latter statute, the usurer was subjected to a forfeiture of a moiety of the value of the property which was the subject of the bargain, one-half to the king, and the other half to the informer, and reserved to the “spiritual jurisdictions their lawful punishments, as in every case of usury.”

Thus the law remained for about fifty years, when in the reign of Henry VIII.<sup>2</sup> the first act recognizing the legality of taking “*interest* upon loans,” was passed.<sup>3</sup> By this statute, ten *per cent.* was allowed for interest on all loans of money, or other things, “for the forbearance or giving day of payment of one whole year, and so, after that rate, for a longer or shorter time.” It was further enacted, that any one who should take more than ten per cent., should forfeit “treble the value of the wares, or other things sold, and should suffer imprisonment and be fined, and ransomed at the king’s pleasure;” one-half of

<sup>1</sup> 11 *Henry VII.*, c. 8.

<sup>2</sup> 37 *Henry VIII.*, c. 9, (A. D. 1545.)

<sup>3</sup> *Tom. Jacob’s Law Dic.*, art. *Usury*.

the fine and forfeiture to go to the king, and the other half to the prosecutor. The common law, and ecclesiastical jurisdictions, were by this statute entirely taken away, and the benefits it conferred were soon felt throughout the kingdom; commercial enterprise advanced, and the doctrine of loans upon interest, now no longer degraded by the law, came to be regarded with favor, and soon triumphed over the bigoted decrees of the Church and the ignorant prejudices of mankind.

All this, however, was not affected without meeting strenuous opposition; but the loud murmurs of the Church availed nothing with Henry VIII., for he had already denied the power of the Pope, and abolished all his authority in England, and declared himself the supreme head of the Church.

Though the brief experience of seven years, during which the Statute of Henry VIII. remained in force, had amply shadowed forth its beneficial effects, yet it was repealed in the following reign,<sup>1</sup> and interest upon loans was again entirely forbidden, under penalty of forfeiture of the principal and usury charged, imprisonment, fine, and ransom at the king's pleasure; premising "that usury is, by the word of God, utterly prohibited, as a vice most odious and detestable, as in divers places of the Holy Scriptures is evident to be seen." By this act of repeal, which gave great dissatisfaction in the mercantile and manufacturing districts, where its effects were the more severely

<sup>1</sup> 5 & 6 Edward VI., c. 20.

felt, the common law and ecclesiastical jurisdictions were revived, and the Church regained and swayed her power with as much vengeance, though with less effect than formerly ; for the Reformation, which had already made great proges, was a powerful counteracting influence. The seeds of true religion, real liberty, and enlightenment, had been planted, and became too firmly rooted ever to be overturned ; and though the ancient cruel and sanguinary laws against heretics and usurers were all revived, and enforced with shocking barbarity by the Catholic Church, against every person and thing obnoxious to it, yet (altough she continued in the ascendant during this and the following reign of Queen Mary), the more enlightened and liberal opinions on usury, which may be said to have sprung, in part, from the Statute of Henry VIII., survived, if they did not gather strength, during the gloomy period of its suspension.

The severity of the Statute of Edward the VI., however, defeated its own object, for instead of diminishing, usury greatly increased,<sup>1</sup> and this fact is recited in the Statute of Elizabeth,<sup>2</sup> restoring the Act of Henry VIII., in these words : “ It being found that the Act of Edward had not done so much good as was

<sup>1</sup> “ Thus the forbidding of usurie, is the very maintaining of damned usurie ; therefore, that which is lawful, in my conceit should be approved, and the restriction and stints clearly sette down and nominated.”—(*Ex. of Nashec. Hume's Hist. of Eng.*, 4 vol., p. 354.)

<sup>2</sup> 13 *Elizabeth*, c. 8. A. D. 1571.

hoped for, but rather that the vice of usury had much more exceedingly abounded,<sup>1</sup> and the Statute of Henry VIII. being one by which the vice of usury was well suppressed," therefore the said Statute of Henry was revived in part, and the legal rate of interest fixed at ten per cent.<sup>2</sup> The statute then declared, with singular inconsistency, that "all usury being forbidden by the law of God, is sin and detestable," and again repealed the common law jurisdiction, so far as it was a temporal law, but expressly exempted from its operation, the ecclesiastical jurisdiction to punish offenders as heretofore.<sup>3</sup>

Here, following in the footsteps of Dr. Wilson, came a host of pious and learned divines, who emulated each other in their efforts to stem the tide of demoralization, which this enactment was likely to produce, and declare usury beyond the pale of all law, human and divine. Notwithstanding this violent opposition, however, money soon became abundant, as commerce increased, and ten per cent. began to be considered as too high a rate; and Hume<sup>4</sup> mentions, as an indication, that France had advanced

<sup>1</sup> "Thus the forbidding of all usury, is the very maintaining of damned usury."—(*Bolton on Us.*)

<sup>2</sup> The statute was not allowed to pass without a violent opposition; it encountered all the concentrated virulence which the ignorance and superstition of its opponents could bring to bear on the question. Dr. Thomas Wilson, the author of a "Discourse on Usurie," before referred to, was one of the principal speakers.—(*Vid. Parl. Deb.*, A. D. 1571, vol. 4, p. 138.)

<sup>3</sup> "Yea! with the thunderbolt of excommunication."—(*Rog. on Us.*)

<sup>4</sup> *Hume's Hist. of Eng.*, 5 vol., p. 484.

before England in commerce, at this period, that Henry IV. had reduced the rate of interest in that country to six and one-half per cent.; and another change presently took place in the English statutes on the subject of interest.

In the following reign,<sup>1</sup> the Statute of James I. reduced the rate of interest to eight per cent., and the Bishops refused to agree to it unless usury was therein degraded as in former statutes. It was therefore provided that “nothing in this law contained shall be construed or expounded to allow the practice of usury in point of religion or conscience.”<sup>2</sup> And Sergeant Rolle, in speaking of this clause, says, “Usury hath been holden infamous by all statutes as horrible and damnable; and when the last statute of eight per cent. was made, the Bishops would not consent to it, because there was no clause in it, as Judge Doderidge said, to disgrace usury, as in former statutes, and for this, as the judges were sitting upon it, a clause was added for this purpose for their satisfaction, as may be seen at the end of the statute.”<sup>3</sup> And this is the last spark of prejudice discoverable in any of the public acts, though it was not so soon extinguished in other countries in Europe.

But the distinction between interest and usury, properly so called, was rapidly becoming better understood; and Lord Chief Justice Lea<sup>4</sup> expressed an

<sup>1</sup> 21 *James I.* A. D. 1624.

<sup>2</sup> *Pal. Mor. Phil.*, 3d book, p. 1, c. 10.

<sup>3</sup> 2 *Roll. Rep.*, 469. *Oliver and Oliver*, 22 *Jac. Mich. B. R.*

<sup>4</sup> *Sanderson v. Warner*, *Palm.* 291. *Temp., James I.*

opinion that it was not *toothless* usury, but only *biting* usury,<sup>1</sup> such as was practised by the Jews, that was illegal; but that usury, such as ten per cent., was not condemned, but tolerated, *if a man chose to endanger his conscience.*

In 1660, the year of the Restoration, the Statute of Charles II.<sup>2</sup> re-enacted in substance the act of the commonwealth, passed ten years earlier, and recited that “the abatement of interest from ten to eight per cent. had, from notable experience, been found beneficial to trade and agriculture, with many more advantages to the nation, and reducing it to a nearer proportion with foreign states with which we trafficue;” and then reduced the rate of interest to six per cent.

No further alteration took place in the law on the subject, for a period of about fifty years, when the Statute of Queen Anne,<sup>3</sup> called “An Act to reduce the rate of interest, without prejudice to Parliamentary securities,” fixed the legal rate of interest at five per cent. This statute was formed upon the Statute of Henry VIII., which was “most strongly constructed for the suppression of usury; and against all persons that should offend against the true meaning of that

<sup>1</sup> Fenton tells us that this distinction between *biting* and *toothless usury*, is a vain device. That the Hebrew word for usury is “Neshee,” which signifies “cruel biting;” the Greek word for the same is “Pleonasmos,” which means “painful travailing;” and the Latin word is “Fœnus,” which means “unnatural brood,” and then argues that the very nature of the thing is greatly to be suspected, for it is ominous and very suspicious to have a *bad name*.

<sup>2</sup> 12 Charles II., c. 13.

<sup>3</sup> 12 Anne, c. 16. A. D. 1713.

statute, by any way or device, directly or indirectly." Indeed all the statutes against usury, since that of Henry VIII., were copied from each other almost verbatim, and differed in no material particular, except that they altered and gradually reduced the rate of interest to the per centage limited by the present Act of Queen Anne. Therefore the decisions under the Statute of Henry VIII., and all the statutes subsequent, are to be considered as declaratory of the law at the present day.<sup>1</sup>

It was enacted by the Statute of Queen Anne, that no person, upon any contract, shall take for loan of any moneys, etc., more than the value of five pounds, for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser period. All bonds and promises to pay money, upon which a greater sum is taken, shall be void; and every one who shall accept and receive by means of any corrupt bargain, loan, exchange, chevisance, shift or interest of any wares, merchandise, or other thing or things whatsoever, or by any deceitful way or means, or by covin, engine, or deceitful conveyance, any money or other thing, above the sum of five pounds, for the forbearing of one hundred pounds for one year, and after that rate for a greater or lesser sum, or for a longer or shorter term, *shall forfeit treble the value of the moneys, etc., and other things lent.*<sup>2</sup> And

<sup>1</sup> *1 Allt.*, 340.

<sup>2</sup> For the details of the law as it stands, under this statute, *vide post.*

this rate is still the law of England, except that express acts of Parliament<sup>1</sup> have empowered the Governor and Company of the Bank of England, and the South Sea Company, to borrow money on such terms, and at such rate of interest, as they may think proper.

Under the Statute of Queen Anne, bills or notes founded upon an usurious consideration were void, even in the hands of bona fide holders for value.<sup>2</sup> The Statute of George III.,<sup>3</sup> reciting the hardship and injustice of this law, enacted "that no bill of exchange, or promissory note shall, though it may have been given for an usurious consideration, or upon an usurious contract, be void in the hands of an endorser for valuable consideration, unless such endorser had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally tainted with usury." Though this act was intended to repeal so much of the Statute of Queen Anne as rendered bills and notes founded upon an usurious consideration, void in the hands of bona fide holders; yet, not having in fact repealed any of the provisions of that statute, it was held not to extend to parties who had taken the bill or note in payment of an antecedent debt, but was confined to the party who had dis-

<sup>1</sup> 3 Geo. I., c. 8, A. D. 1716.

<sup>2</sup> *Lowe v. Walker, Doug.*, 736; 2 B. & Ald., 590; 8 Price, 228.

<sup>3</sup> 58 Geo. III., ch. 93.

counted or given value for it. But as to this point, see *post*.

The Statute of Queen Anne, however, did not affect contracts made abroad. Thus the payment of the East Indian interest of twelve per cent. was enforced by the Courts in England upon bargains made in India, "because the refusal to enforce such contracts would put a stop to foreign trade."<sup>1</sup> But restrictions upon interest have been gradually disappearing in England, for many years past, and her policy is to afford every facility and aid to the enterprise of her merchants, and remove every obstacle that may stand in the way of her commerce. Thus (by the third and fourth of William IV., c. 98), bills and notes payable at or within three months, are exempted from the operation of the usury laws, and by a subsequent act<sup>2</sup> in the same reign, notes given for an usurious consideration, are not *void*, but deemed to have been given for an *illegal* consideration. The exemption was afterwards extended to bills and notes not having more than *twelve* months to run. And now (by two and three Vict., c. 37), no bill or note, not having more than twelve months to run, nor any contract for loan or forbearance of money, *above the sum* of ten pounds, shall, by reason of any interest taken thereon, or secured thereby, etc., be void, nor the liability of any party thereto, or any person borrowing, be affected by any statute or law in force for the prevention of usury. This law,

<sup>1</sup> *Bl. Com.*, 2, p. 451.

<sup>2</sup> 5 & 6 William IV., 41.

however, does not sanction the recovery in any court of law or equity, more than the legal rate, unless it appears to the court, that a different rate of interest was agreed upon between the parties, nor affect any statute relating to pawnbrokers.

Usury was not altogether prohibited by the common law,<sup>1</sup> though it seems to have been a matter of doubt with the highest authorities to what extent it was recognized. Sir Edward Coke was of opinion that it was prohibited, and says, that “by the ancient laws of the realm, usury was unlawful and punishable.”<sup>2</sup> And further, “that all usury being forbidden by the law of God, is sin, and detestable.”<sup>3</sup> But Chief Justice Hale thought that only the Jewish usury of forty per cent. was against the common law.<sup>4</sup> At all events, the common law was entirely abrogated by the Statute of Henry VIII.,<sup>5</sup> which repealed all former acts, statutes and laws, and declared all pains and penalties and forfeitures for the same utterly void, expressly taking away both the common law and ecclesiastical jurisdiction.<sup>6</sup> The subsequent

<sup>1</sup> *Note to Evans Statutes*, Part 3.

<sup>2</sup> 3 *Inst.*, 152.

<sup>4</sup> *Hard.*, 420.

<sup>3</sup> 2 *Inst.*, 151.

<sup>5</sup> 37 *Henry VIII.*, c. 9.

<sup>6</sup> Mr. Plowden, in his Treatise on Usury, states his opinion, and endeavors to prove that the common law concerning usury is still in force and unaltered, and says (at page 61): “When a statute or act of Parliament is made concerning any point of common law, the common law concerning that point is changed, altered or affected by the statute so far only as the statute expressly goes. So, where an Act of Parliament inflicts a new punishment for an old offence at common law, it still remains an offence, and punishable at common law, as it was before the Act passed. Forgery, for instance,

Statute of Edward VI, which repealed the Statute of Henry VIII., of course revived the common law, and ecclesiastical jurisdictions, but was afterwards, in its turn, repealed by the Statute of Queen Elizabeth, which, however, expressly saved the ecclesiastical

was made a felony by the 5th of Elizabeth, yet it remained an offence at common law, punishable as it was before that statute. I should here say positively, without hesitation, that the common law of usury at this moment exists in its full extent, except as to those instances in which it has been expressly altered by substituting statutes, were it not for the authority of Lord Coke. There is, however, a difference to be made between the authority of our law writers, be they ever so great, when they deliver their own opinions, and when they report the decisions of the Courts. Lord Coke's own opinions claim general, not universal submission, and it is with the greatest diffidence that I venture to suggest that, in this instance, I feel myself under the necessity of withholding my assent to the opinion of that great man : ”

“ The preamble of this Act\* (he continues at page 64) speaks too clearly of itself to need comment. ‘ Where, before this time, divers and sundry acts, statutes and laws have been ordained and made within this realm for the avoiding and punishing of usury, being a thing unlawful, and of other corrupt bargains, shifts and chevizances, which acts, statutes and laws have been so obscure and dark in sentences, words and terms, and upon the same so many doubts, ambiguities and questions have arisen and grown, and the same acts, statutes and laws have been of so little force and effect, that by reason thereof little or no punishment hath ensued to the offenders of the same, but rather hath encouraged them to use the same.’ It is matter of serious importance to ascertain precisely what was repealed and what was enacted by this statute. \* \* \* The question now under discussion is, whether by this Act of Henry VIII. the common law of usury were made void and of none effect? Lord Coke's opinion in the affirmative I cannot subscribe to. The words of the repeal appear conclusive against it, viz.: that the *said acts, statutes and laws heretofore made of or concerning usury, shifts corrupt bargains and chevizances, and all pains, forfeitures and penalties concerning the same.* These words evidently refer to and are merely coextensive with the words of the

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\* 37 Henry VIII., c. 9, entitled “ A Bill against Usury.”

jurisdiction.<sup>1</sup> "So, that, at this day, neither the common law (says Sir Edward Coke), nor any of the Statutes made previously to that of Henry VIII., (except the ecclesiastical jurisdiction saved by the Statute of Elizabeth), is now in force."<sup>2</sup>

preamble, *sundry acts, statutes and laws ordained, had and made within this realm for the avoiding and punishing of usury.* Now it is manifest that these acts, statutes and laws must be *written laws*, for to them alone is applicable any *obscurity* in *sentences, words and terms.* The mischief which is complained of, and is intended to be remedied by this statute, could not have arisen or grown out of an *unwritten law*, such as the common law of England is. It appears equally unquestionable, that the Legislature had only in contemplation the inefficacy of such punishments as were directed and imposed by these acts, statutes and laws, which were so obscure in their *sentences, words and terms* as to be of little force and effect."

We cannot acknowledge the correctness of the conclusions at which Mr. Plowden arrives by the above arguments. The proper meaning of the words, "acts, statutes and laws," and the construction they were intended by the Statute of Henry VIII. to bear, seems to us to include the written as well as the unwritten law; that is, both the statute and the common law. The former designated as "acts and statutes," and the latter properly described by the term "laws." Thus the words, "acts, statutes and laws," include both the written and common laws. In the Statute of Edward VI., which repealed the Statute of Henry VIII., and *revived the common law*, the word *laws* is omitted, and *acts and statutes* only referred to; and as to the other argument, that the expression, "sentences, words and terms," used in the Statute of Henry VIII., as the occasion of "doubts, ambiguities and questions," can only be applicable to *written laws*, we do not see that the expression is not equally applicable to the common law, which, though frequently called the *unwritten law*, is yet, in fact, written and contained in the books of our law authors, and is quite as likely as the statutes to be the occasion of doubts, ambiguities and questions.

<sup>1</sup> 13 *Elizabeth*, c. 8., § 9.

<sup>2</sup> Mr. Plowden (p. 66), in commenting upon the conclusions to which Sir Edward Coke arrives, says, "The learned commentator upon these statutes of usury appears to have substantially contradicted his own opinion upon the abrogation of the common law.

It is somewhat remarkable that, until late years, all the guilt of usury had been laid by most of the writers on the subject at the door of the lender; and none of the authors who alluded to the point at all

*For, says he, the ecclesiastical jurisdiction is saved by the said Statute of the 13th of Elizabeth, as thereby it appeareth.* Now, the direct inference from Lord Coke's words is—therefore the common law was not abrogated or abolished by the 27th of Henry VIII., for if it had been, then the *ecclesiastical jurisdiction* over usury could not have been *saved*, though it might have been *revived* by this subsequent Act of Elizabeth. Now, this *saving* of the ecclesiastical jurisdiction, of which Lord Coke here speaks, is the direct saving of the common law against usury."

This charge against Sir Edward Coke, of contradicting his own opinion, is not warranted by what he said concerning the ecclesiastical jurisdiction; and Mr. Plowden seems, in drawing his conclusions, to have omitted to consider the effect of the Statute 5 and 6 Edward VI., &c. 20, which came between the two statutes he speaks of in the passage above quoted. We have already seen that the Statute of Henry VIII., in express words repeals "all former acts, statutes, and *laws* concerning usury." This Act of Henry VIII. was in its turn repealed by the Statute 5 and 6 Edward VI.; so that the common law and ecclesiastical jurisdiction were thus *revived*, and were in force when the Statute of Elizabeth was passed. This latter statute again repealed the common law, so far as it was a temporal law, but *saved* from its operation the ecclesiastical jurisdiction. And it is fortunate for the usurer that the law is as stated by Sir Edward Coke, for if the *saving* here referred to had been a *saving of the common law of usury*, and not only the ecclesiastical jurisdiction, as contended for by Mr. Plowden, the usurer would still be liable on his death, to the forfeiture declared by the common law, namely, all his property.

Mr. Ord, in his treatise on usury, at p. 20, in speaking of this subject, says, "But I notwithstanding think, that in one sense usury may be said to be still punishable by the common law. The same act of taking exorbitant interest, which is punishable specifically as usury by statute, is a species of extortion or oppression, and as such is punishable by the common law, by fine and imprisonment; but it seems that usury is not now punishable, *eo nomine*, at common law. The case of *King v. Walker*, *Sid.* 421, & 3 *Salk.*, 391, proves that the same act, which is punishable

seem to have considered that it was in any way sinful to borrow and pay the usury. Dr. Wilson, whose work we have before referred to, having therein heartily abused and consigned the usurer to perdition for his “wickednesse,” proceeds to consider how far the borrower is *particeps criminis*. “And now,” says he, “cometh to my mind a matter most needful to be spoken of after such heats of speeche used against the usurer, that whether he that payeth usurie be an offender or no, for some think, because there can be no usurie without borrowing, those therefore that borrow are at fault as they which do give cause of this horrible offence; I do answer that everie borrower doth not sinne, because it is an involuntary action, and much against the borrower’s will,<sup>1</sup> *who would rather, with all his heart, borrow freelie, and paie nothing for the loan than otherwise.*” No one can quarrel with this conclusion. But the opinion, “that every borrower doth not sinne,” we cannot so readily subscribe to, nor entirely acquit the borrower of blame. If usury is a sinful and immoral act, and *malum in se*, which most of these

as usury by statute, may be informed upon at common law as a *corrupt agreement*. It was there moved in arrest of judgment, than an information on the statute was had; and held by the court, that, if upon the information judgment could not be given on the statute to pay treble the money taken, yet being found that the defendant took forty shillings by a *corrupt agreement*, judgment should be given against him at the common law, which was fine and imprisonment.”

<sup>1</sup> “For the sinne of rape cannot be without the innocent party that is ravished.”—(*Bishop of Derry*, quoted in *Blaxton’s Eng. Usurer*, 2d edit., 1634.)

writers contend it is, then any co-operation or participation whatever, direct or indirect, taints with the crime; and a borrower upon usury is as much *particeps criminis* as he who deliberately sanctions an act of robbery, adultery, or murder.

Chief Justice Treby seems to have thought that the crime of usury equally affected both parties, and refused to allow a borrower to recover back money paid upon an usurious bond, and said, "That where one knowingly pays money upon an illegal consideration, the party that receives it ought to be punished for his offence; and the party that pays it is *particeps criminis*, and there is no reason that he should have the money again, for he parted with it freely, and *volenti non fit injuria*."<sup>1</sup> But the courts have entirely overruled Chief Justice Treby's opinion, and Lord Mansfield said, in *Browning v. Morris*, that the party injured might bring his action, and recover back the excess of interest. And the rule is settled, that where the crime and penalty fall on one party only, as upon the lender in usury, and upon the insurer on insurance, then the other has his action.

It is worthy of remark, that the united voice of all ages and nations, barbarous or civilized, has been raised against the practice of *usury*, properly so called. In the Koran of Mahomet, the institutes of Menu, the Tables of China, and in the Statutes of Europe, it is condemned and viewed by the people

<sup>1</sup> *Tompkyns v. Barnet*, 1 Salk., 22, A. D. 1693.

with disgust and aversion, and Dr. Fenton, in his learned work, says: "The testimony of all authority, civil and humane, ecclesiastical and prophane, naturall and morall; of all ages, old, new, middling; of all churches, primitive, superstitious, reformed; of all common weales, Jewish, Christian, heathenish; of all lawes, forraine and domesticall, are against usurie;" and triumphantly asserts the surprising fact, "that usurie was never even defended for fifteen hundred years after Christ." And other divines follow in similar strain. "God, nature, reason, all scripture, all law, all authors, all doctors, yea, all councils are against usurie. Philosophers, Greeks, Latins, Lawyers, Divines, Catholics, Heretics, all tongues, all nations, have thought an usurer as bad as a theefe."<sup>1</sup>

Towards the beginning of the seventeenth century, however, as we have already seen, whatever remained of the ancient prejudices against usury, were fast wearing away among the mass of the people, and the complaints against the "sinne of usury," declined with the opinions that gave rise to them. Experience had now shown the advantage of allowing a moderate rate of interest for the use of money, and proved too that it was more efficacious in suppressing real usury than all the statutes previously made. Thus, for instance, the legal rate of interest, it will be remembered, had been eight per cent. since the Statute of James I., until the Statute of Charles II., yet loans during that period were commonly made at

<sup>1</sup> *Mosse.*

six per cent., "clearly shewing," says Mr. Bentham, "that money, like any other commodity, fluctuates with supply and demand, and that the limit fixed by law, can never regulate the market value."<sup>1</sup>

Trade was now extending to the most distant shores, agriculture improved, the arts and sciences advanced with rapid strides, industry found recompense, and ingenuity reward; and much of this was brought about by commerce, which, in its turn, only grew into importance when a fair rate of interest on loans of money was permitted, by which the coffers of the wealthy were opened, and the riches of the world put in circulation; for commerce cannot subsist without mutual and extensive credit, and that credit cannot be had without profit; and, as Blackstone hath it,<sup>2</sup> unless money can be borrowed, trade cannot be carried on; and if no premium were allowed for the hire of money, few persons would care to lend it; or, at least, the ease of borrowing at *short warning* (which is the life of commerce), would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb,<sup>3</sup> and fell entirely into the hands of the

<sup>1</sup> In 1787, when Mr. Bentham wrote his Defence of Usury, the rate of interest in Russia was fixed at five per cent., but no money was lent at that rate; and that eight, nine and ten per cent. were common rates, even on the best landed security.

<sup>2</sup> 2 Bl. Com., p. 455.

<sup>3</sup> "Shew me," said Sir Edward Faynes, in the House of Lords, "a State without usury, and I will shew you a State without trade."

Jews and Lombards ; but when men's minds began to be more enlarged — when true religion and real liberty revived — commerce grew again into credit, and again introduced with itself, its inseparable companion, the doctrine of loans, upon interest.

The increasing capital employed in extending commerce and rewarding industry and ingenuity, will not only attain these great objects, but by reason of its rapid circulation, make money seem to be the more plenty, and reduce the rate of interest for which its use may be had, and indicate besides the real state and condition of foreign trade and intercourse. Thus interest [says Hume] being justly considered the barometer of the state, the lowness of its rate is an infallible sign of the flourishing condition of the people, and of the increase of industry.<sup>1</sup>

<sup>1</sup> *Hume's Essay on Interest.*

## CHAPTER III.

### THE COLONIES.

THE history of usury in this country presents little of interest to repay the search, yet it is necessary to our purpose to know something concerning it, and we will therefore examine, though as briefly as possible, its inception and continuance to the present time.

The British title to the territory comprising these United States, was founded on the right of discovery by John Cabot, who, in the year 1496, discovered and claimed for his sovereign,<sup>1</sup> the vast desert country which stretches from the Gulf of Mexico to the most northern regions.<sup>2</sup> This great continent was afterwards colonized and cultivated by the people of the kingdom, great numbers of whom flocked to the new found land.

“Government of some sort is necessary to the existence of society,”<sup>3</sup> hence we come immediately to the question: By what law were these colonists to be governed?

To answer this satisfactorily, it will be proper for us to inquire a little concerning the general princi-

<sup>1</sup> *Henry VIII.*

<sup>2</sup> *Robertson's Hist. of America*, B. 9.

<sup>3</sup> *Dr. Channing.*

ples of public jurisprudence on the subject, and the nature or description of the colonies so established.

Colonies are of two kinds: either such as are acquired by peopling and occupying uninhabited or desert regions; or such as being already inhabited and cultivated, are acquired by conquest or cession. Between these two species of colonies, there is a great difference in respect to the laws by which they are to be governed. Of the first, it has been said, that if an uninhabited country be discovered and planted by British subjects, the English laws then in being, which are the unalienable right of every subject, are immediately there in force.<sup>1</sup> But this must not be understood to mean that such colonists carry with them the whole body of the English laws; for many of them must necessarily be wholly inapplicable to the nature, character, and circumstances of the new colony. Therefore, those laws which they carry with them are only such as are properly applicable to their situation, and are not repugnant to, or inconsistent with, the local and political circumstances in which they are placed.<sup>2</sup> Thus the English rules of inheritance, and of protection from personal injuries, the rights secured by Magna Charta, and the remedial course in the administration of justice, are examples of the laws which are presumed to be

<sup>1</sup> 2 *Salk.*, 411; 2 *P. Will.*, 75; 1 *Blk. Com.*, 107.

<sup>2</sup> *Chitty on Perog.*, ch. 3., p. 29. A statute passed in England, after the establishment, will not affect it, unless it be particularly named.—(See cases collected in *Chit. Com. Law*, 638.)

adopted as applicable in the first place, while other laws are only adopted as the growth or interests of the colony may dictate.<sup>1</sup>

The rule is different, however, in respect to conquered or ceded colonies, which already have laws of their own. In such cases, the crown has a right to abrogate the existing laws, and institute new ones; but until this is done, the old laws and customs of the country remain, and must be administered.

We are thus particular in stating these different rules, because it involves the question, whether or not the English common law was ever adopted, or of authority in the United States. Blackstone says: "Our American plantations are principally of this latter sort, *i. e.*, conquered or ceded countries, being obtained in the last century, either by right of conquest and driving out the natives (with what natural justice, I shall not at present inquire), or by treaties. And, therefore, the common law of England, as such has no allowance or authority there; they being no part of the mother country, but distinct, though dependant dominions."<sup>2</sup>

Mr. Justice Story,<sup>3</sup> however, thinks there is great reason to doubt the accuracy of this statement, in a legal point of view. The European nations, by whom America was colonized, treated the subject in a very different manner.<sup>4</sup> They claimed an absolute do-

<sup>1</sup> 1 *Bl. Com.*, 107.

<sup>2</sup> 1 *Bl. Com.*, 107.

<sup>3</sup> *Story, Com. on Con.*, v. 1, p. 101.

<sup>4</sup> 1 *Chalm. Annals*, 676; 3 *Wilson's Works*, 234.

minion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession by the Indian natives, but as a right acquired by discovery.<sup>1</sup> Some of them, indeed, obtained a sort of confirmatory grant from the Papal authority, but as between themselves, they treated the dominion and title of the territory as resulting from priority of discovery;<sup>2</sup> and that European power which had first discovered the country, and set up marks of possession, was deemed to have gained the right, though it had not set up a colony there.<sup>3</sup> The title of the Indians was not treated as a right of priority and dominion, but as a mere right of occupancy.<sup>4</sup> As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations.<sup>5</sup> The territory over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals. There is not a single grant from the British crown, from the earliest of Elizabeth, down to the latest of George II., that affects to look to any title, except that founded on discovery. Conquest or cession is not once alluded

<sup>1</sup> *Vattel*, b. 1, c. 18, ss. 205–209.

<sup>2</sup> 8 *Wheat.*, R. 543, 576–595.

<sup>3</sup> *Penn v. Lord Baltimore*, 1 *Vez.*, 444.

<sup>4</sup> 3 *Ken's Com.*, 308; 1 *Chalm. Annals.*, 676; 4 *Jeff. Corres.*, 468; *Worcester v. Georgia*, 4 *Peters. Rep.*, 515.

<sup>5</sup> But see Sir James Macintosh, on the *Progress of Ethical Philosophy*, p. 49.

to. And it is impossible that it should have been ; for at the time when the leading grants were respectively made, there had not been any conquest or cession from the natives, of the territory comprehended in those grants.

The Indians were considered as a people not having any regulur laws, or any organized government, but as mere wandering tribes.<sup>1</sup> They were never reduced into actual obedience as dependant communities ; and no scheme of general legislation over them was ever attempted. For many purposes, they were treated as independent communities, at liberty to govern themselves, so they did not interfere with the paramount rights of the European discoverers.<sup>2</sup>

The public charters proclaimed that the colonies were established with a view to *enlarge the boundaries of the empire*. They became, then, part of the State, equally with its ancient possessions;<sup>3</sup> and the “colonists, continuing as much subjects in the new settlements, where they had freely planted themselves with the consent of the Crown, as they had been in the old, carried with them their birth-right, the laws of their country ; because the customs of a free people are a part of their liberty.” And the jurisprudence

<sup>1</sup> *Vattel*, b. 1, c. 18, ss. 208-9 ; *Kent's Com.*, 312.

<sup>2</sup> *Wheat. R.*, 590 ; 1 *Grahame's Hist. of America*, 44 ; 3 *Kent's Com.*, 311 ; *Worcester v. State of Georgia*, 6 Peters. Sup., C. R., 515. See 1 *Story on Con.*, pp. 101-106, where the subject is fully examined.

<sup>3</sup> *Vattel*, b. 1, c. 18, s. 209 ; 1 *Chalm. Annals.*, 676 ; 8 *Wheat. R.*, 595 ; *Grotius*, b. 1, c. 9, s. 10.

of England became that of the colonies, so far as it was applicable to the situation at which they had newly arrived, because the people were Englishmen, residing within a distant territory of the empire.<sup>1</sup>

It being, then, by right of discovery, that England founded her title to America, it follows, that the subjects of that kingdom, who subsequently formed and organized the colonies, carried with them, and retained the rights and privileges of Englishmen inhabiting a common country, and the colonies were to be deemed a part of the ancient dominions.

And so, to quote the language of Mr. Justice Story:<sup>2</sup> “The universal principle (and the practice has confirmed it) has been, that the common law is our birth-right and inheritance, and that our ancestors brought hither with them, upon their emigration, all of it which was applicable to their situation. The whole structure of our present jurisprudence, stands upon the original foundations of the common law.”

From the period of the first establishment of the colonies, the common law of England was recognized, and in its leading features seemed very acceptable to the colonists. They adopted, too, and used the great body of the English statutes, and, among the rest, the whole of the English rules in regard to usury; which they continued to enforce in the different colonies until their respective legislatures framed

<sup>1</sup> 1 *Chalm. Annals.*, 677; *Id.*, 14, 15, 65; 2 *Wil. Law. Lec.*, 48;  
<sup>3</sup> *Wil. Law. Lec.*, 234.

<sup>2</sup> 1 *Story on the Constitution*, 104.

and passed acts for themselves, to regulate the rate of interest.<sup>1</sup>

And very curious and quaint are some of the old cases reported in the books concerning that "*detestable sin of usurie*," for which our ancestors were freely introduced to all the pains and penalties attached to the statutes, enforced with all the bitterness approved by the prejudices of the times. But enough of example has been said on the subject, in the earlier pages of this work, to render further reference to it here unnecessary; hence, we will hasten to enumerate the various legislative enactments that have been spread upon the statutes of our several states, since their legislatures respectively have existed.

<sup>1</sup> The first legislature that ever sat in America, was in the Colony of Virginia, in 1619, at which time Sir George Yeardley was Governor. The sanction, however, of the home government, was not obtained until 1621, when an ordinance came from England allowing the establishment of a Colonial Legislature, but required that body, in all its acts, "to imitate the policy of the form of government, laws, customs, and manner of trial, and other administration of justice, used in the realm of England, as near as may be."

## CHAPTER IV.

### ALABAMA.

IN the pages of this chapter we shall note as briefly as possible, all the principal statutes that have been enacted in this country, from time to time, on the subject of usury; though not in the order in which they were made, for that would involve us in confusion; nor in the order of the establishment of the different colonies, though that might seem the most regular method; but in the alphabetical order of the present existing States, as the most familiar and of readier reference—only premising that most of the Colonial Statutes, and many of those of the subsequent States, were closely fashioned upon the English model.

In Alabama, interest was allowed by Statute in 1805, at the rate of six per cent. In 1818, an act was passed permitting parties to stipulate in writing, for any rate of interest they chose to agree upon, on all bona fide contracts. The following year, however, this statute was repealed by the act now in force, and established the legal rate of interest at eight per cent. In 1833, an amendment was made to this act; but it did not affect the rate of interest,

and the act of 1819, with the amendment, is still the law of the State.<sup>1</sup> On contracts reserving more than the legal rate, the principal only can be recovered.<sup>2</sup>

The present act in Arkansas was passed in February, 1838, and fixed the rate of interest at six per cent., when no other rate is agreed upon; but allows parties to stipulate in writing for interest, as high as ten per cent. All contracts reserving more are void, except negotiable paper in the hands of innocent holders, for valuable consideration, without notice. The lender is liable to no penalty, but the borrower, who has paid usury, may recover the same in an action to be brought therefor, within one year.<sup>3</sup> Corrupt intent, however, is the gist of the action.<sup>4</sup>

In California, the act to regulate interest, was passed on the 13th March, 1850, and fixed the rate at ten per cent., but allows parties to agree upon any other rate whatever, even compound interest;<sup>5</sup> and any judgment upon such contract shall be entered accordingly, and bear like interest.<sup>6</sup>

<sup>1</sup> 1860.

<sup>2</sup> *Clay's Digest*, 589; Edit., 1843. *Code of Alabama*, Ormond. Sec. 1523; Edit. 1852.

<sup>3</sup> *Rev. Stat. of Arkansas*, 469; Edit. 1838. *English Dig.* 614; Edit. 1848.

In a case where plaintiffs held several notes against defendant, and by agreement with him, calculated the interest due on each note, added it to the principal, and took a new note for the whole sum bearing *ten per cent.* interest—it was held not to be an usurious contract.—(*Turner v. Miller*, 1 *English's Rep.* 463.)

<sup>4</sup> *McFarland v. State Bank*, 4 *Ark. Rep.*, 410.

<sup>5</sup> *Wood's Dig. Laws of Cal.*, p. 551; Edit. 1860. *Cosly v. McDermitt*, Jan. T. 1857. (Cited.)

<sup>6</sup> *Emeric v. Tams.*, 6 *Cal.*, 155.

The original Statute against usury, in Connecticut, is included in the laws of that State, published in 1718. It continued in force until 1838, when it was amended and substantially re-enacted. It is embodied in the revised Statutes of 1849. It limits the rate of interest to six per cent., and declares all contracts reserving more, utterly void;<sup>1</sup> but there must be a corrupt agreement and intent to evade the statute, *at the time* of making the contract: a contract lawful in its inception, cannot be made usurious by any matter *ex post facto*.<sup>2</sup> An agreement to pay compound-interest, is not usurious.<sup>3</sup>

In the year 1759, an act was passed by the Legislature of Delaware, reducing the Pennsylvania rate of interest, which had previously been the rule in Delaware, from eight to six per cent., with a penalty of forfeiture of the whole debt for taking more, one-half to the state, and the other to the informer.<sup>4</sup> And this is still the law of that State.

In Florida, acts were passed concerning usury and interest, in 1822; and in 1829, two acts, to regulate the rate of interest. In 1832, another was passed, which was repealed again the following year, by the Act of February 12, 1833, which was the law until repealed in its turn, by the Act of March, 1844. This last act is still in force, and establishes the rate

<sup>1</sup> *R. S.*, 618, edition of 1849.

<sup>2</sup> *Swift's Digest*, revised edition, 1853, p. 308, and *cases cited*.

<sup>3</sup> *Camp. v. Bates*, 11 Conn. Rep., 487, (1836).

<sup>4</sup> *Laws of Delaware*, p. 314, edition 1829; *Ibid.*, *Revised Code*, p. 188, edition 1852.

of interest on all contracts, at eight per cent. by stipulation, and six per cent. when no rate of interest is expressed by the parties, with a penalty for taking more, of forfeiture of the whole amount of interest then due, one-half to go to the county treasury, and one-half to him who will inform and sue for the same.<sup>1</sup>

In March, 1759, the first act against usury was passed in Georgia, allowing interest at eight per cent. It was repealed in 1822, and the treble forfeiture clause contained in the original act, omitted.<sup>2</sup> But in 1845, the present act was passed, and the rate of interest fixed at seven per cent.;<sup>3</sup> where more than the legal rate of seven per cent. is reserved, the creditor can only recover the principal of the debt, but is liable to no forfeiture.

In Illinois a statute against usury was passed in April, 1833, and allowed interest as high as twelve per cent. by agreement between the parties, and six per cent. when nothing was said about interest; but in 1845 the statutes were revised, and the law materially altered, since which, in 1853 and 1857, amendatory acts have been passed, which have again altered the law, and leave it at the present time as follows: Six per cent. is allowed where no other rate

<sup>1</sup> *Thom. Digest*, 234, edition 1847.

<sup>2</sup> *Prince's Digest Laws of Georgia*, p. 294, et. seq. edit., 1837; *Hotchkiss*, 442. By the first section of the Act of 1759, here alluded to, it was declared, that any person taking more than eight per cent., should forfeit *treble the amount of the principal*.

<sup>3</sup> *Cobb's Digest*, p. 393, edition 1851.

is agreed on; but parties may stipulate and agree upon a rate as high as *ten* per cent. upon all contracts, written or verbal; and in township loans of school funds, twelve per cent. may be taken. An agreement is not rendered void by the reservation of usurious interest, but when that fact appears in any action, the creditor can only have judgment for the amount of the principal sum due; but no corporation can interpose the defence of usury in any action.<sup>1</sup>

In Indiana, under the Statute of 1831, any rate of interest might be taken that was stipulated for in writing; but the Statute of 1838, which was substantially embodied in the Revised Statutes in 1843, and is now in force, fixed the rate of interest at six per cent., except when the parties agree upon a higher rate, which must, however, in no case exceed ten per cent.<sup>2</sup>

In Iowa, six per cent. is the rate of interest established by law; but the parties to contracts may stipulate therein for a rate as high as ten per cent., with forfeiture of ten per cent. on the amount of the contract, to the State School Fund, in case of taking more.<sup>3</sup>

In Kentucky, the first act against usury was passed in 1798. It was repealed in 1819, by the Act now in force, which fixed the rate of interest at

<sup>1</sup> *1 R. S. Illinois* (edit. 1858), p. 600.

<sup>2</sup> *R. S. Indiana*, 1843, p. 576. See Amendment Sess. Laws of 1845, p. 12.

<sup>3</sup> *Act of January, 1853, Rev. Stat. of Iowa*, p. 316 (1860).

six per cent. By the Act of 1798, reserving more than legal rate of interest are declared utterly void.<sup>1</sup> But under the present statute the lender may recover the principal and lawful interest.

In Louisiana, by the 2,895th Article of the Civil Code, interest is fixed at five per cent. on all sums which are the subject of judicial demand, and on sums discounted by the Banks, at the rate established by their charters. Conventional interest cannot exceed ten per cent.<sup>2</sup> But in 1860 an act was passed by which it was provided that the owner of an obligation for the payment of money might collect the whole amount of the principal, notwithstanding such obligation included a greater rate of interest than eight per cent., and repealed all laws in conflict with said Act.<sup>3</sup>

In Maine a statute against usury was passed in March, 1821, and established six per cent. as the legal rate of interest, with forfeiture of the whole debt for taking more; one moiety to the informer, and the other to the State. It was amended in 1834, by authorizing a defendant to plead usury in bar, or when paid, to recover back the excess, provided the action for that purpose be brought within one year of the date of such payment. The laws on the subject of usury, with the rest of the statutes, were

<sup>1</sup> *Morehead & Brown's Dig.*, 852, 856. See note and cases cited; *Rev. Stat. Ken.*, p. 63, edit. 1860.

<sup>2</sup> 7 *L. R.*, 520. *Cox v. Mitchell.*

<sup>3</sup> *Acts of 5th Legis. of Louisiana*, Jan'y, 1860.

revised, however, in 1840, and again in 1857, and as revised are still in force. They fix the legal rate of interest at six per cent., except as to letting of cattle, or similar contracts in practice among farmers, maritime contracts, bottomry-bonds, and exchange in practice among merchants. On contracts reserving more, the excess will be deducted from the amount due, and recovery for the balance only had, and excess paid may be recovered back in action brought for that purpose within one year.<sup>1</sup>

In Maryland the first act against usury was passed in 1692, and provided, that no person within the province should upon any contract take, for the loan of money, or other thing to *be paid in money*, more than £6 per cent.; or for the loan of tobacco, wares, etc., to be *paid in kind*, £8 per cent.; under a penalty of forfeiting treble the value of the goods, wares, etc., taken, and the contract to be utterly void. This act seems to have continued in force until 1704, when the present statute was passed. It is substantially the same as the former, and has continued, without alteration, from its passage to the present day,<sup>2</sup> except only as to the treble forfeiture clause, which was repealed in March, 1846.<sup>3</sup>

“By a law of the Colony of Massachusetts, 1461, it is declared, that no man shall be adjudged for the mere forbearance of any debt above eight pounds in

<sup>1</sup> *Rev. Stat., Maine*, p. 317, edit. 1840; *Rev. Stat., Maine*, p. 323, edit. 1857.

<sup>2</sup> 1 *Dorsey, Laws of Maryland*, p. 5, edit. 1840.

<sup>3</sup> *Ses. Laws of 1846*, ch. 352, § 5.

the hundred for one year, and not above that rate, proportionably, for all sums whatsoever, bills of exchange excepted; neither shall this be a colour or countenance to allow any usury amongst us contrary to the law of God."<sup>1</sup> In 1693 this act was repealed, and interest reduced to six per cent.; and contracts reserving more were utterly void, and the parties declared liable to a penalty of the full value of the goods or monies received or taken, one-half to the commonwealth, and the other half to any person who would sue for the same. Marine contracts were not included in this act. It continued in force, without alteration, until 1783, when it was in substance re-enacted with an additional clause, directing the mode of proof in cases of usury. This new statute, with slight amendments, continued the law until the passage of the Act of 1825, which is embodied in the Revised Statutes of 1836<sup>2</sup> and 1860,<sup>3</sup> wherein the rate of interest is declared to be six per cent., but no contract reserving more shall be thereby rendered void; but when it appears in action brought on such contract, that a greater rate of interest has been reserved, the defendant may recover his costs, and the plaintiff forfeit three-fold the amount of excess merely, and shall have judgment for the balance. And when the excess has been paid, three-fold may be recovered back in action brought for that purpose,

<sup>1</sup> *Abr. Laws and Ord. of New England*, London, 1703.

<sup>2</sup> *Rev. Stat.*, p. 307, edit. 1836.

<sup>3</sup> *Rev. Stat.*, p. 293, edit. 1860.

provided it be so brought within two years from the time of payment.<sup>1</sup>

The Territorial Legislature of Michigan fixed the legal rate of interest at seven per cent., by statute in 1833. The act was afterwards amended and adopted in the Revised Statutes of the State in 1846, now in force, by which parties to a contract may stipulate in writing for any rate of interest not exceeding ten per cent. Upon contracts which do not fix the amount of interest, and upon all judgments of the courts, seven per cent. is the legal rate; reserving more renders the contract void for the excess of interest only.<sup>2</sup>

In the State of Minnesota, prior to the passage of the present act, any rate of interest agreed on by parties in contract, specifying the same in writing, was legal and valid, and when no rate was specified, the statute established seven per cent. All judgments recovered in any Court of the State bore twelve per cent. interest from the day of rendition of the same.<sup>3</sup> But in 1860 a new act was passed, fixing the rate of interest at seven per cent., unless a different rate be contracted for in writing, in which event parties may stipulate for any rate not exceeding twelve per cent.; and all judgments made by any Court of the State draw interest at six per cent. only.<sup>4</sup>

<sup>1</sup> *Rev. Stat.*, edit. 1860, p. 292.

<sup>2</sup> *Rev. Stat.*, *Mich.*, 161, edit. 1846; 1 *Compiled Laws*, p. 424, edit. 1857.

<sup>3</sup> *Stat. of Min.*, p. 376, edit. 1859.

<sup>4</sup> *Gen'l Laws Min.* (2d Sess.), 1860, p. 226.

In Missouri, the Act of December, 1834, allowed parties to stipulate in writing for a rate of interest as high as ten per cent. upon all contracts, and declared six per cent. to be the legal rate when there was no agreement in respect to interest. This act was amended in 1841. In 1845 the statutes were revised, and a new act on the subject of usury included, whereby parties were permitted to agree in writing for interest not exceeding ten per cent.; and interest might become part of the principal, and bear interest; but the creditor was not allowed to compound the interest oftener than once a year. All former acts, however, are repealed by the present act, now in force, passed in 1847, which declares six per cent. to be the legal rate, and no more; and where a higher rate is reserved, the borrower will be relieved from the usurious excess, and the interest at six per cent. will be appropriated to the benefit of the Common Schools.<sup>1</sup>

In Mississippi, prior to the passage of the act now in force, eight per cent. was the legal rate of interest on contracts, but for the bona fide loan of money the parties might stipulate for interest as high as ten per cent. But now eight per cent. per annum for the bona fide use of money, and six per cent. upon all other contracts, is the established rate of interest.<sup>2</sup>

In New Hampshire, prior to the passage of the present existing statute, interest was regulated by the English rule, except that in commercial transactions a higher rate might be stipulated for, but in

<sup>1</sup> *Acts of 1847*, p. 63.

<sup>2</sup> *Acts of 1842*, 212. Amendment.

1791 the Legislature fixed the rate of interest at six per cent. upon all contracts, with a forfeiture for taking more, of three times the sum so taken; one moiety to the use of the prosecutor, and the other moiety to the use of the county in which the offence is committed, with the costs of the prosecution. The letting of cattle, and other usages among farmers, and marine and insurance contracts, are excepted, and this is still the law in that State.<sup>1</sup>

In New Jersey, the first statute against usury was passed in 1738, and fixed the rate of interest at seven per cent. Contracts reserving more were declared void, and a penalty of forfeiture of all received on them followed. In 1823, the rate of interest was reduced to six per cent., but in other respects the law was not materially changed,<sup>2</sup> and remained without variation until the revision of the statutes in 1846, when the rate of interest was fixed at six per cent., and now all contracts on which a higher rate is reserved are utterly void, and the law declares a penalty against the party taking such higher rate, of forfeiture of the full value of the money or goods lent, sold or bargained for, one moiety to the use of the State, and the other to the prosecutor, to be recovered with costs of action.<sup>3</sup>

In 1852, a curious exception was made in favor of Jersey City and township of Hoboken, in the county

<sup>1</sup> See also *R. S. of 1842*, Tit. 22, ch. 190; *Com. Stat.*, p. 490, edit. 1853, p. 383.

<sup>2</sup> *Elmer's Digest*, 261.

<sup>3</sup> *Stat. of N. J.*, p. 795, edit. 1847.

of Hudson, whereby seven per cent. is permitted to be reserved on all contracts made in said city and township by and between persons actually located therein, or not residing in the State.<sup>1</sup>

And again in 1860, a similar exception was made in favor of the township of Acquackanonk, in Passaic county, and on all contracts made in that township, seven per cent. may be reserved, provided one of the parties to the contract resides therein, or out of the State.<sup>2</sup>

And in 1862, a similar exception was made in favor of Middlesex county.<sup>3</sup>

The first law against usury, in the Colony of New York, was passed in the third year of the reign of George I., A. D., 1717, and established interest at six per cent. It appears to have been intended only as an experiment, for it contained a clause limiting the term of its continuance in force to five years. It was amended, however, the following year, and increased the rate of interest to eight per cent. These acts contained clauses providing for forfeitures, for taking more, similar to the Statute of Queen Anne, above mentioned.<sup>4</sup> In 1737, interest was reduced to seven

<sup>1</sup> *Acts 76th Legis. N. J.*, 1852, p. 447.

<sup>2</sup> *Acts 84th Legis. N. J.*, 1860, p. 111.

<sup>3</sup> *Acts 86th Legis. N. J.*, 1862, p. 314.

The sale of a note or bond of another, at any rate of discount, is not usurious; but if the note or bond was made for the express purpose of being sold at a greater discount than legal interest, it is usurious and void. And a note void from usury when made, is void in the hands of an innocent holder.—(*Chas. Williamson, July 7, 1825.*)

<sup>4</sup> *Bradford's Colonial Laws.*

per cent., and this last act has continued, with slight alterations in 1783, and subsequent revisions of the statutes until 1830. The revised statutes then declared that interest upon a loan or forbearance of any money, goods or things in action, shall continue to be seven *per cent.* per annum. Any who shall pay a greater sum for a loan, or his representatives, may recover the excess. All contracts or securities upon which a greater sum is reserved or agreed to be paid, shall be void; "but this section (5th) shall not extend to any bills of exchange or promissory notes, payable to order or bearer, in the hands of an endorsee or holder, who shall have received the same in good faith, and for valuable consideration, *and who had not, at the time of discounting such bill or note, or paying such consideration for the same, actual notice* that such bill or note was originally given for an usurious consideration, or upon an usurious contract."<sup>1</sup>

The statute in that shape was scarcely any practical restraint upon usurers, and indeed the reservation in the fifth section afforded them facilities, and the most shameless usury was daily and openly taken. The act of May, 1837, however, which now regulates the rate of interest in this state, repealed the objectionable reservation, and further provided, that any person who should receive any greater sum, &c., "in violation of the provisions of said title, or this act, shall be deemed guilty of a misdemeanor, and, on conviction thereof, the person so offending shall be pun-

<sup>1</sup>*R. S.*, part 2, c. 4., title 3.

ished by fine not exceeding \$1000, or imprisonment not exceeding six months, or both;" and so the law stands to this day. These acts do not affect bottomry and respondentia bonds and contracts.

In 1850, it was enacted that no corporation should be permitted to interpose the defence of usury in any action.<sup>1</sup>

The first act against usury in North Carolina, was passed in 1741. It was several times amended and revised by subsequent acts, but the last revision in 1836 is still in force, and the rate of interest there allowed is established at six per cent. All contracts, bonds and assurances whatsoever, reserving a higher rate, are utterly void, and any person receiving more, is liable to a forfeiture of double the amount of the loan, one moiety to the State, and the other to the informer.<sup>2</sup>

In Ohio the Territorial Legislature enacted a law in 1795, declaring in force the 13th Elizabeth, c. 8, and the 37th Henry VIII., c. 9; but in 1799 an act was passed repealing the former, and fixing the rate of interest at six per cent., with a forfeiture of all over the principal lent, in case of reserving more. The first statute passed by the *State* to prevent usury was in 1804. It was repealed in January, 1824, by the act now in force, which went into effect on the 1st of June, 1825. It was amended in 1844, but not

<sup>1</sup> *Laws of N. Y.*, 1850, ch. 172, sec. 1. 3 *Rev. Stat.* (5 edit., 1859), p. 72, *et. seq.*

<sup>2</sup> 1 *Rev. Stat.*, 606, edit. 1837. *Rev. Code*, 597, edit. 1855. *McBrayer v. Roberts*, 2 *Dev. Eq.*, 75. *Jones v. Cannady*, 4 *Dev.*, 86.

materially altered. Interest is six per cent., "and no more."<sup>1</sup> Further than this, the statute was silent, and the courts held, contracts reserving more than the above rate to be usurious, and usurious contracts to be void.<sup>2</sup> But in 1848 an amendatory act was passed, whereby it is provided that all payments made by way of usurious interest, whether paid in advance or not, shall be deemed, as to the excess of interest allowed by law, to be payments on account of the principal.<sup>3</sup> Interest due, however, may be turned into principal, and draw interest;<sup>4</sup> and in a contract to pay instalments of a principal sum, with interest periodically, where interest was charged upon each successive charge of interest, after they respectively became due, until paid, was held to be valid.<sup>5</sup>

In Pennsylvania, prior to November, 1700, the rate of interest, limited by the first colonial act, was eight per cent., but the act of that date reduced it to six per cent., and annexed a forfeiture of the money, goods, or other things lent, for taking or reserving more. This act was repealed in February, 1705, and restored the former rate of interest; but in March, 1723, it was re-enacted;<sup>6</sup> since which time several amendatory acts have been passed in 1856, '57, '58, and '59, and the existing law upon the

<sup>1</sup> *Swan's Statutes, Ohio*, 465, edit. 1841.

<sup>2</sup> *1 Rev. Stat.*, 139, edit. 1860. See cases cited in note.

<sup>3</sup> *1 Rev. Stat.*, *O.*, p. 744, edit. 1860.

<sup>4</sup> *Fobes v. Cantfeld*, 3 *O. R.*, 17.

<sup>5</sup> *Watkinson v. Root*, 4 *O. R.*, 373.

<sup>6</sup> *Dunlop's Stat.*, p. 42, 1846.

subject of interest may be stated as follows: interest is fixed at six per cent., and any excess is not recoverable, but may be deducted from the debt; and where excess has been paid, it may be recovered back, provided the action for that purpose be brought within six months after the time of such payment; but negotiable paper in the hands of *bona fide* holders is not affected, and commission merchants and agents of parties not residing within the commonwealth may contract to retain interest at seven per cent. upon balances in their hands.<sup>1</sup> Usury laws do not apply to railroad and canal company bonds.

In the January session of the Rhode Island Legislature, 1767, a statute against usury was passed, and limited the rate of interest to six per cent. upon all contracts. It was amended in 1795 and 1817. In 1822, however, the present statute, repealing all former acts, was passed, and has since been embodied in the Revised Statutes of 1844,<sup>2</sup> whereby six per cent. is fixed as the legal rate; there is no forfeiture, but in an action on an usurious contract, judgment will be given for the principal sum lawfully due, and legal interest, with costs. The statute does not extend, however, to the letting of cattle, or other usages in practice among farmers, or to maritime contracts, bottomry-bonds, insurance or exchange.

In South Carolina interest was fixed by statute, passed in 1719, at ten per cent., and all contracts

<sup>1</sup> *Pur. Dig.*, p. 561, edit. 1862.

<sup>2</sup> *Rev. Stat., R. I.*, p. 277, edit. 1857.

reserving more were utterly void, with forfeiture of treble the principal, or value of the thing lent, for taking more.<sup>1</sup> This was substantially re-enacted in 1721; but in 1748 the rate was reduced to eight per cent., and in 1777 was further reduced to seven per cent.; but the act retained the treble forfeiture clause for taking more.<sup>2</sup> The last mentioned clause, however, was repealed in December, 1830, by the act of that date, leaving the legal rate of interest seven per cent., and declaring, that on all contracts reserving more, the principal only can be recovered, without any interest or costs of action.<sup>3</sup>

In Tennessee the laws of the State of North Carolina concerning usury, were in force until 1819, when an act was passed making usury an indictable offence.<sup>4</sup> In 1835 this act was repealed by the statute now in force, which has fixed the rate of interest at six per cent. If more is reserved, the defendant can only avoid the usurious excess, and the plaintiff may recover the principal of his debt, with legal interest.<sup>5</sup>

In Texas, the distinction between legal and conventional interest is recognized. The former is eight per cent., and the latter twelve. Upon contracts in which more than twelve per cent. is reserved, the principal only can be recovered.<sup>6</sup> All judgments

<sup>1</sup> 3 *S. C. Stat. at Large*, pp. 106, 132.

<sup>2</sup> 4 *S. C. Stat. at Large*, p. 363.

<sup>3</sup> 6 *S. C. Stat. at Large*, p. 409.

<sup>4</sup> 1 *Stat. Ten.*, p. 368, edit. 1831.

<sup>5</sup> *Caruther's & Nicholson's Dig.*, p. 406, edit. 1836.

<sup>6</sup> *Dig. Gen. Stat. Tex.*, p. 242, edit. 1859.

bear interest at eight per cent., provided they are given upon contracts in which no more than eight per cent. was stipulated. Interest previous to this statute was five per cent.<sup>1</sup>

The first statute against usury in Vermont, appears to have been passed in 1796, and fixed the rate of interest at six per cent. Forfeit of all over that rate, and twenty-five per cent. in addition, one moiety to the prosecutor, and the other to the State. In 1822, a new statute was passed, and since embodied in the revised statutes, now in force in that State,<sup>2</sup> whereby legal interest is fixed at six per cent., and any excess paid over that rate may be recovered back with interest; but the letting of cattle and like usages among farmers, marine contracts, and bottomry bonds are excepted.

In the year 1730, the rate of interest was fixed by statute in Virginia at six per cent. upon all contracts; but four years later it was reduced to five per cent., and this rate continued to be the law, through the different revisions and alterations of the statutes, until the passage of the Act of 1796, when interest was raised to six per cent. The last-mentioned act took effect on the first of May, 1798, and continued in force until the passage of the present act in 1819, when all the laws on the subject of usury were reduced into one act. By this last act six per cent. is still the legal rate of interest, and every contract in

<sup>1</sup> *Dall. Dig. L. T.*, p. 105. *Hartley's Dig.*, p. 496.

<sup>2</sup> *Rev. Stat.* (1839), p. 366, edit. 1840.

which a higher rate is reserved is void; and the lender receiving such usurious excess, is liable to a penalty of twice the debt to be recovered in a *qui tam* action.<sup>1</sup>

In Wisconsin, parties to contracts are allowed by statute to stipulate for interest as high as ten per cent.;<sup>2</sup> but if no rate of interest is specified, seven per cent. is prescribed by the statute. When a

<sup>1</sup> *Tate's Dig.*, 318. *Code of Vir.*, p. 576, edit. 1849. 11 *Matthew's Dig.*, 458, *et seq.*, edit. 1857.

NOTE.—This last section being penal, is construed strictly, and applied only where *usury* (in its full legal meaning) has been actually *taken*. It is not enough that it is *contracted* for. The offence is incomplete unless the *usury* is *taken*. See opinion of Justice Carr in *Spengler v. Snapp*, 5 *Leigh*, 507. See also *Turpin v. Poval*, 8 *Leigh*, 102.

To constitute *usury* in the Courts of Virginia, there must be a borrowing and a lending with an intent to exact more interest than is allowed by law. The usurious *intent* is the gist of the matter.—(*Price v. Campbell*, 2 *Call.*, 110; *Childers v. Dean*, 4 *Rand.*, 406; *Loyd v. Scott*, 4 *Peters*, 205.) Thus a tacit understanding between borrower and lender, founded on a known practice of the latter, to lend money at legal interest, if the borrower *purchase from him a horse*, at an unreasonable price, is a shift to evade the statute against *usury*.—(*Douglas v. McChesney*, 2 *Rand.*, 109.) The devices resorted to are often difficult, and sometimes impossible to detect; but in all cases it is a question for the jury, whether one party has had the use of the other's money, and has paid or is to pay for it, more than lawful interest in *any way or manner*. The jury must judge from a review of all the facts and circumstances of the *intention* of the parties, which lies at the foundation of the inquiry.—(2 *Par. on Con.*, 387.)

Taking interest in advance upon discounting a note is not usurious, and in fact this is a recognized practice with banks and business men throughout the country, and has been sustained by decisions in the courts of most of the states in the Union.—(*Parker v. Cousins*, 2 *Grat.*, 372; *State Bank of N. C. v. Cowan*, 8 *Leigh*, 238.)

<sup>2</sup> This rate was established since the revision of the statutes in 1858, by an amendatory act passed in March, 1860.

greater rate is reserved than is allowed by the law, the party paying may recover back treble the amount of the excess in an action of assumpsit, provided the suit be instituted within one year from the day of payment of such excess. Contracts reserving more are valid, but no interest thereon is recoverable.<sup>1</sup>

In the District of Columbia, interest is awarded at the rate of six per cent. upon all judgments rendered upon contracts on the common law side of the Circuit Court.<sup>2</sup> The law of Maryland has been in no way altered or modified, except that banks in the District of Columbia are permitted to calculate and charge their discount and interest, according to the standard and rates set forth in "Rowlett's Tables."<sup>3</sup>

By the "Act to provide for a National Currency, &c., and to provide for the circulation and redemption thereof," it is provided that every association (doing business under that act) may take upon any note, or other evidence of debt discounted by them, such rate of interest or discount as is for the time the established rate of interest, in the absence of contract between the parties, by the laws of the several States in which the associations are respectively located; and such interest may be taken in advance at the time of making the loan or discount, according to usual rules of banking; but the wilful taking of a rate of interest greater than that above specified, is

<sup>1</sup> *Rev. Stat. Wis.*, p. 410, edit. 1858.

<sup>2</sup> *U. S. Statutes at Large*, ii., 756.

<sup>3</sup> *U. S. Stat. at Large*, iv., 310.

declared to be a forfeiture of the debt. The purchase or sale, however, of a bill of exchange drawn on actually existing values, and payable at another place than the place of such purchase, discount or sale, will not be considered as taking or charging interest.<sup>1</sup>

The whole law of usury will be found fully discussed in the *Earl of Chesterfield v. Janssen*,<sup>2</sup> since which Lord Abinger said, in reviewing the cases: "there is none in which anything new is to be found;"<sup>3</sup> but the case is much better reported elsewhere.<sup>4</sup>

It will be seen that but seven States<sup>5</sup> in the Union make a contract void for usury so far as to prevent the creditor on such contract from recovering his principal. And as to one at least of these,<sup>6</sup> it appears that, while a contract whereby more than seven per cent. is taken is generally void, this does not extend to bills of exchange, notes payable to order or bearer in the hands of an innocent holder, who received the same in good faith, and for a valuable consideration, and who has no notice of the usurious inception. And it is particularly noticeable throughout the

<sup>1</sup> 12 U. S. Stat. at Large, p. 679. (1863.)

<sup>2</sup> 1 Wilson, 286.

<sup>3</sup> *Downes v. Green*, 12 M. & W., 490.

<sup>4</sup> 2 Vesey, 125. And see Notes in 1 *White & Tudor's Eq. Cases*, 378, and *Mr. Perkins' Note* to 8th edit. of *Chitty on Contracts*, page 611.

<sup>5</sup> Connecticut, Delaware, Maryland, New York, New Jersey, North Carolina, and Virginia.

<sup>6</sup> New York.

cases, that though the laws of many States permit the interposition of pleas of usury, yet they are nowhere regarded with favor, and invariably discouraged and characterized as unconscionable pleas — pleas offering a premium to dishonest practices.

It will be seen from the foregoing pages, that the statutes against usury now in force in the several States of the Union, and in other countries, are very different and conflicting; and as the business relation between these becomes more intimate every day, it may not be amiss to inquire a little concerning the *rules* which are to interpret and govern in cases where these different laws conflict. The subject is extremely interesting and of high importance, and one upon which a vast deal of law exists, for it has engaged the attention of legal tribunals wherever, the world over, the enterprise of man has carried commerce; but it is unnecessary, in the present work, to do more than state (as briefly as possible) the *general principles* sanctioned by public policy, and enforced by the Courts, concerning the "conflict of laws."

## C H A P T E R V.

### C O N F L I C T O F L A W S.

THE law of nations, strictly so called, was in a great measure unknown to antiquity, but is essentially the growth of modern times, under the combined influence of Christianity and commerce.<sup>1</sup> As intercourse among nations increased, and contracts, exchanges, sales, and successions became more frequent among persons domiciled in different countries having different laws on the same subjects, the importance of some common principles and general rules of right, of mutual obligation, became more and more obvious, and their necessity more urgently felt. As an instance of this: suppose two subjects of different countries enter into a contract, valid in the place where it is made, but not in conformity to the laws

<sup>1</sup> 1 *Ward, Law of Nations*, p. 120; *Id.*, 171. Among a host of jurists who have displayed their research and acuteness on the subject of international law, the most prominent are Dumoulin, D'Argentre, Burgundus, Rodenburgh, Paul Voet, John Voet, Boulleois, Bouhier, and Huberus; and their respective doctrines, pretensions, and merits are critically and ably examined by Mr. Livermore, of New Orleans, in his Dissertation on Personal and Real Statutes, a work which, as Judge Kent says in a note to p. 455 of his Commentaries, is very creditable to his learning and vigorous spirit of inquiry.

of the country where it is sought to be enforced; it is plain, that unless some uniform rules are adopted to govern such cases, there will be an utter confusion of rights and remedies, and the grossest inequalities in the administration of justice between the subjects of different countries; which, in the end, will entirely put a stop to their trade and intercourse. Thus we see the great importance of international law; yet until within the last fifty years, comparatively little had been effected by any of the European writers towards systemizing, and defining with accuracy and precision, the principles of this most interesting branch of public jurisprudence; and even at this time much remains to be done before the science of international law can be said to be perfect.

It is a branch of public law of more interest to the United States than to any other nation, since each of the thirty-six States already existing are distinct, and, in some respects, independent States, united under a national government; and this state of things necessarily creates very complicated private relations between the citizens of those States, which constantly call for the administration of extra municipal principles. These controversies, however, rarely assume the consequence of national negotiations, and the jurisprudence arising from the conflict of the laws of the different States may, therefore, be properly considered as private international law.<sup>1</sup>

<sup>1</sup> *Story's Conf.*, 3d edit.

It is not our place or purpose here to enter into a full examination of the conflict of foreign and domestic laws, which naturally include many branches of public jurisprudence, and make a sufficient theme for a treatise by itself, but merely to consider such as affect or pertain to our subject. To this end, it will be proper, in the first place, to state the general rules or maxims commonly recognized as constituting the foundation of all the reasonings, and, according to Huberus,<sup>1</sup> which solve all the intricacies of the subject.

The first great principle is, that every nation possesses an exclusive sovereignty and jurisdiction within the limits of its own territory, and its laws bind all who are found within those limits, whether their residence is permanent or temporary.<sup>2</sup> The laws, therefore, of one country, while they are absolute over all the property, real or personal, within its territory, and bind its own subjects, and all others within its jurisdictional limits, can have no intrinsic force in any other country, and do not command, of right, the slightest obedience; and any power they may exercise abroad is voluntarily or tacitly conferred by that respect which motives of public policy dispose other nations to yield to them.<sup>3</sup>

The next maxim, and which flows as a natural

<sup>1</sup> *Huberus Conflictu Legum*, p. 538.

<sup>2</sup> Rodenburgh, Paul Voet, and Boulleois announce, in substance, this and the following rule.

<sup>3</sup> *Henry on Foreign Law*, p. 1; 1 *Boullenois Prin. Gen.*, 6, p. 4.

consequence from the first, is that no State or nation can by its laws bind or affect any person or property out of its own territory. This rule springs, of course, from the exclusiveness and absolute sovereignty which every nation possesses within its own territory. It is the necessary result of the dignity and independence of distinct Governments.<sup>1</sup>

The last general principle is, that any force or obligation which the laws of one nation may have in another, depends solely upon the express or implied consent of the latter, or its own proper jurisprudence.<sup>2</sup> Thus a State may prohibit or admit the operation of foreign laws. It may recognize or give effect to some, and refuse the same notice to others. And it is for a "nation to form its own judgment of what its conscience prescribes to it; of what it can or cannot do; of what is proper or improper for it to do," in giving effect within its own territories to the laws of another country.<sup>3</sup> But when its own statutes or common law are positive on the subject, they are to be obeyed to the exclusion of all other law. If, however, both these are silent, then, and then only, can the question arise, what law is to govern in the absence of any express declaration of the sovereign's will? And the courts in this case presume the tacit adoption of the foreign rules by

<sup>1</sup> *Blanchard v. Russell*, 13 Mass. R., 4; *Bank of Augusta v. Earle*, 13 Peters. R., 584.

<sup>2</sup> These rules are the same in substance as the three axioms laid down by Huberus; for which, see *post*.

<sup>3</sup> *Vattel, Prelim. Disc.*, p. 61.

their own government, unless they are repugnant to its policy, or prejudicial to its interests.<sup>1</sup>

Or as Huberus states them, in his three axioms :

1. That the laws of every empire have force, only, within the limits of its own government, and bind all who are subjects thereof, but not beyond those limits.
2. That all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof.
3. That the rulers of every empire, from comity, admit, that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the power or rights of other governments, or of their citizens.<sup>2</sup>

Hertius,<sup>3</sup> however, and other continental writers,

<sup>1</sup> *Story, Conf. Laws*, p. 47.

<sup>2</sup> “(1) *Leges cuiusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra.* (2) *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorenentur.* (3) *Rectores imperiorum id comitir a<sup>g</sup>unt, ut jura cuiusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.”—(*Hub. Lib.*, 1, tit. 3; *de conflictu Legum*, s. 2.)*

The doctrine, as thus laid down, stands upon just principles; and though from its generality, it leaves many grave questions open to discussion, yet its truth and simplicity commend it; and it has been repeatedly recognized, sanctioned, and approved, by the courts, both in England and this country.—(*Robinson v. Bland*, 2 *Burr R.*, 1077; *Holman v. Johnson*, Cowper, 341; *Pearsall v. Dwight*, 2 *Mass. R.*, 84; *Holmes v. Remsen*, 4 *John. Ch. R.*, 469; 4 *Cowen R.* 410, note; *Greenwood v. Curtis*, 6 *Mass. R.*; *Saul v. his Creditors*, 17 *Martin R.*, 569; 2 *Kent Com.*, 457—464, and cases cited; *Co. Lit.*, 79; *Story, Conf. Laws*, 37.)

<sup>3</sup> *Hertii Opera de Collis Leg.*, p. 120.

doubt whether the comity of nations, founded upon the notion of mutual convenience, can furnish a basis sufficiently solid, upon which to rear a system, as contended by Huberus. But in attempting to settle the true principles of international jurisprudence, they engaged in endless controversies with each other, involved the subject in a perplexity of rules, and finally admitted that the difficulties in the way of their adjustment were almost insurmountable. "When so many men of great talents and learning," said Judge Porter,<sup>1</sup> "are thus found to fail in fixing certain principles, we are forced to conclude, that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that comity is, and ever must be, uncertain. That it must necessarily depend upon a variety of circumstances which cannot be reduced to any certain rule. That no nation will suffer the laws of another to interfere with her own, to the injury of her citizens. That whether they do or not, must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her insti-

<sup>1</sup> *Saul v. his Creditors*, 17 Martin R., 569.

tutions. That in the conflict of laws, it must often be matter of doubt which should prevail; and whenever a doubt does exist, the court which decides, will prefer the laws of its own country to that of the stranger."

The Supreme Court of the United States also directly recognized the doctrine of the comity of nations, as laid down by Huberus; and Chief Justice Taney, in the case of the *Bank of Augusta v. Earle*, said: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of one will, by comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in foreign countries, are familiar examples; and courts of justice have always expounded and executed them according to the laws of the place in which they were made: provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations, is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the law of nations. It is truly said, in Story's *Conflict of Laws* (§7), that 'In the silence of any positive rule affirming, or de-

nying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.”

It is a principle of the common law, however, and opposed to the doctrine just stated, that no nation will regard or enforce the revenue laws of any other country; and the contracts of its own citizens made in evasion or fraud of the laws of foreign nations, may be enforced in its own tribunals.<sup>1</sup> But a contract made in France to smuggle goods into this country, will be treated by our courts as utterly void, by reason of the fraud intended upon our laws,<sup>2</sup> and in such a case it will be wholly immaterial whether the parties are citizens or strangers. This rule, however, seems to be different in England, and in a case where goods were sold in France by a Frenchman to an Englishman for the known purpose of being smuggled into England, it was held that the seller could maintain suit in England for the price of the goods, upon the ground that the sale was complete in France, and

<sup>1</sup> *Boucher v. Lawson*, Cas. Temp. Hard., 85, 194.

<sup>2</sup> *Armstrong v. Toler*, 11 Wheat. R., 258. In this case the principles and authorities are fully discussed by the Court.

See also opinion of Mr. Justice Porter in *Ohio Ins. Co. v. Edmonson*, 5 Louis R., 595, *et post*.

the seller had no concern with the smuggling transaction. The contract is complete, said the Court, and nothing is left to be done. The seller indeed knows what the buyer is going to do with the goods; but he has no concern in the transaction himself. But if he enters at all, as an ingredient, into the contract between the parties that the goods shall be smuggled, or that the seller shall do some act to assist or facilitate the smuggling, such as packing them in a particular way, then the seller is deemed active and the contract will not be enforced.<sup>1</sup>

As frequent reference will be made in the course of this inquiry to the "Law of the Domicil," it will perhaps be well before proceeding further, to ascertain the legal meaning of the term, and the sense in which it is used by jurists.

The term "domicil," as used by writers on the law, refers to the national or local abode of a person; and in a legal sense is that certain, fixed home or establishment in which he takes his principal residence, and to which, when he is absent, he intends to return. Domicile, however, according to Mr. Justice Story, is of three sorts; domicile by birth, domicile by choice, and domicile by operation of law. The first is the common case of the place of birth, *domicilium originis*; the second is that which is voluntarily acquired by a party *proprio marte*. The last is consequential, as that of the wife arising from marriage.<sup>2</sup>

<sup>1</sup> *Holman v. Johnson*, 1 Cowper R., 341; *Lightfoot v. Tenant*, 1 Bossanquet & Puller R., 551.

<sup>2</sup> See the reasonings upon which these conclusions are based; and the subject fully examined, in *Story's Conf. L.*, pp. 51-62.

All laws which relate to the capacity, state, or condition of persons, are considered as personal laws; and include all laws concerning majority or minority, emancipation, marital authority, minors, parents, guardians, legitimacy, civil death, infamy, nobility, foreigners, naturalization,<sup>1</sup> and the like. And these have been divided by jurists into two sorts, universal and special. A universal personal law, as its description imports, relates to the universal state or condition of persons, such as their majority, minority, or the like. While a special personal law creates an ability or disability, and is such as declares infamy, civil death or the like, and is strictly local in its operation.<sup>2</sup> But all personal laws of the first kind are held to be of absolute obligation everywhere, when they have once attached upon the person by the law of his domicil. Hence, says Hertius, the state and quality of a person are to be governed by the law of the place, to which he is by his domicil subjected. Whenever a law is directed to the person, we are to refer to the law of the place, to which he is personally subject. *Hinc status et qualitas personæ regitur a legibus loci, cui ipsa sese per domicilium subjicit. Quando lex in personam dirigitur, respiciendum est ad leges illius civitatis, quæ personam habet subjectam.*<sup>3</sup> Thus, that person who has attained the age of majority, by the law of his native domicil, is to be deemed the

<sup>1</sup> *Boullenois* Obs. 4, p. 46; *Id.*, App., 48; *Rodenburg, De Div. Stat.*, tit. 2., ch. 5.

<sup>2</sup> *Henry on For. Law*, 2; *Story Confl.*, 64.

<sup>3</sup> *Hertii de Collisione Legum*, pp. 122, 123.

same age everywhere else,<sup>1</sup> and vice versa. And the law of the domicil governs not only the state of the person, but his personal actions and movable effects also, in whatever place they may be situated, according to the maxim that movables follow the person. *Mobilia sequuntur personam*; and any disposition of them will generally be considered valid or not, according to the law of the domicil. This rule, however, as indeed all the rules relative to personal abilities and disabilities, are subject to infinite exceptions, which it would be foreign to the subject of this treatise to notice here, and they will therefore only be alluded to as occasion seems to require. But the rule is different in regard to real or immovable property. The law of the place where real property is situated, regulates the disposition of it; and when the law of the domicil and that of the *situs* are in conflict with each other, if the question is respecting person, the law of the domicil ought to prevail; but if it is respecting the property, the law of the place where it is situated is to be followed.<sup>2</sup>

Thus, where the laws of the domicil declare that a minor or a married woman, or others, are incompetent to contract in the place of his or her domicil, they will generally be deemed to be incompetent everywhere; consequently, if a citizen of France, in

<sup>1</sup> *1 Burg. Comment. on Col. and For. Law*, p. 113; *1 Boullenois*, p. 103.

<sup>2</sup> *Merlin, Repertorie Universal et Raisonne de Jurisprudence*. Sec. 10, art. 2.

his own country, who is under the age of twenty-five years, should order or purchase goods in this country, he will not be bound by his contract, for he is, by the laws of his domicil, deemed a minor, and therefore incapable of making such a contract. And this rule is good where it relates to the disposition of personal or movable property. But if a Frenchman who is a minor by the *lex loci domicilii*, makes a contract in a country where, by the law of that place, he had attained the age which constitutes majority, and where accordingly he is competent to contract, the *lex loci contractus* in such a case will govern, and he may make a valid contract.<sup>1</sup>

Mere personal disqualifications, however, created by the customary or positive law of one country, will not generally be regarded in other countries where the like disqualifications do not exist. Hence penal disabilities and disqualifications resulting from slavery, heresy, excommunication, and the like, are strictly territorial.<sup>2</sup>

But transactions concerning real estate are, as we have already stated, governed solely by the *lex rei sitae*.<sup>3</sup> And the principles of the common and civil law are alike on this point, both maintaining the sovereignty over the soil, and that the laws of the

<sup>1</sup> 1 *Burge. Com. on Col. & For. Law*, 132.

<sup>2</sup> *Hertii Opera De Collis Leg.*, 124; 1 *Burge. Com. on Col. & For. Law*, 734; *Hen. on For. Law*, 30; 2 *Hagg. Adm. R.*, 94; *Boullenois Obs.*, 52; 1 *Voet. ad Pand.*, p. 40.

<sup>3</sup> 2 *Dwarris on Stat.*, 648; *Warrender v. Warrender*, 9 *Bligh R.*, 127; 2 *Burge. Com. on Col. & For. Law*, pt. 2, c. 4.

place where such property is situated, shall exclusively govern in respect to the rights of the parties, and the manner and ceremonies attending the transfer thereof, therefore the title to real estate can only be acquired, passed or lost, and the abilities, rights and duties of the parties in relation thereto only be determined, by the *lex rei sitae*.<sup>1</sup>

And in a conflict between a personal law of the domicil and a real law, either of the domicil or of any other place, the real law prevails over the personal law. Thus a person who has attained his majority, and has, as incident to that status, the power of disposing by donation, *inter vivos* of everything he possessed, may, by the real statute of the place in which his property is situated, be restrained from giving the whole, or from giving it except to particular persons. And these principles are recognized by the authorities both in England and in this country, in their fullest import, and may now be considered as thoroughly well settled.<sup>2</sup> So, a conveyance or will of land, or a mortgage or contract concerning real estate or immovable property, or any other thing of a local character, is exclusively subject to the laws of the government within whose territory it is situated.<sup>3</sup> And the test by which real and per-

<sup>1</sup> Paul Voet states the rule thus: "Ut immobilia statutis loci regantur, ubi sita."—(*De Stat.*, p. 253.)

<sup>2</sup> *Liv. Diss.*, and cases cited. The authorities on this point are very numerous.

<sup>3</sup> *Vattel*, B. 2, sec. 110. *Chapman v. Robertson*, 6 *Paige R.*, 627; 2 *Burge. Com. on Col. & For. Law*, p. 577.

sonal statutes may be distinguished consists, according to Merlin, in the circumstance that if the principal, direct and immediate object of the law be to regulate the condition of the person, the statute is personal, whatever may be the remote consequences of that condition upon property. But if the principal, direct and immediate object of the law be to regulate the quality, nature and disposition of property, the statute is real whatever may be its ulterior effects in respect to persons.<sup>1</sup>

In regard to contracts made in foreign countries, it has mostly been held by jurists, that the law of the domicil, respecting the capacity of persons to contract, ought to govern; but the common law doctrine is, that the *lex loci contractus* is to govern.<sup>2</sup> The general rule followed by the courts is, that the nature, construction, and validity of a contract is to be decided by the law of the place where it is made —*locus contractus, regit actum*—unless it is to be performed in another country, in which case the law of the place of performance is to govern, in conformity to the presumed intention of the parties, that as to the nature, validity, and obligation of the contract, it is to be interpreted and governed by that law.<sup>3</sup> A contract valid by the law of the place

<sup>1</sup> *Repertoire de Jurisprudence*, tit. Autorisation Maritale, s. 10.

<sup>2</sup> *Liverm. Diss.*, 34; *Thompson v. Ketcham*, 8 John. R., 189; *Andrews v. His Creditors*, 11 Louis. R., 464.

<sup>3</sup> 2 *Kent Com.*, pp. 393, 459; 3 *Burge. Com.*, p. 771; *Story Conf. L.*, 432, and cases cited. *Lord Mansfield*, in *Robinson v. Bland*, 2 *Burr. R.*, 1077. The decisions on this point, however,

where it is made is, generally speaking, valid everywhere, *jure gentium*, and by tacit assent. If the rule were otherwise, the citizens of one country could not safely contract or carry on commerce in the territories of another. The necessary intercourse of mankind requires that the acts of parties, valid where made, should be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State.<sup>1</sup> So also contracts, void by the law of the land where they are made, are void in every other country.<sup>2</sup> And it may be stated as the settled doctrine of the public law, that personal contracts are to have the same validity, interpretation, and obligatory force in every other country, which they have in the country where they were made.<sup>3</sup> And the rule which the courts follow in relation to contracts made in one country, and put in suit in another, is truly stated by Huberus; he says, the interpretation of the contract is to be governed by the law of the country where the contract was made; but the mode of suing, and the time of suing, must be governed by the law of the country where the action is

are conflicting in the details, and the rules and distinctions somewhat embarrassing, but the main principle has throughout been adhered to.

<sup>1</sup> 2 *Kent Com.*, p. 454; *Hub. De Conf. Leg.*; *Voet ad Pand.*, lib. 5, tit. 1, § 51. See note to 2 *Kent Com.*, p. 458.

<sup>2</sup> *Alves v. Hodgson*, 7 Tenn. R., 241; *Desebats v. Berquier*, 1 *Binney's R.*, 336; *Houghton v. Page*, 2 N. H. R., 163.

<sup>3</sup> *Bank of the U. S. v. Donnally*, 8 Peters. U. S. R., 361; *Watson v. Orr*, 3 Dev. N. C. R., 361.

brought.<sup>1</sup> This rule has become part of the *jus gentium* in all civilized countries; and the comity of nations is satisfied by thus allowing to foreigners the use of the same remedies that are provided for the citizens of the State. Thus a plea of the statute of limitations of the State where the contract is made, is no bar to an action brought in a foreign court to enforce the contract; but the same plea of the statute of the State where the suit is brought is a valid bar, provided the actual, open, and public residence of the party in the place, for the period limited by the statute, entitles him to its benefits. And in admitting the law of a foreign nation to govern in regard to contracts made there, every nation merely recognizes from a principle of comity the same right to exist in other nations, which it demands and exercises for itself.<sup>2</sup> Thus, a contract which comes within the statute of frauds, such as agreements respecting the sale of lands, or the sale of goods beyond a certain amount, or for the debts of third persons, cannot be sued upon unless they are in writing. If such contracts, made by parol in a country by whose laws they are required to be in writing, are sought to be enforced in another country, they will be held void, exactly as they would be held void in the place where they were made, and *vice versa*.<sup>3</sup> But when

<sup>1</sup> *Hub. De Conflictu Legum*, § 7; *De la Vega v. Vianna*, 1 B. & Adolph., 284; *Trimby v. Vignier*, 1 Bing. N. C. R., 151; *Dunscomb v. Bunker*, 2 Medcalf's R., 8.

<sup>2</sup> *Blanchard v. Russell*, 13 Mass. R., 1, 4.

<sup>3</sup> *Erskin's Inst.*, b. 3, tit. 2, s. 39; *Vidal v. Thompson*, 11 Mar-

the law of the place of the bargain, and that of the place of performance is in conflict, it seems that the latter will govern.<sup>1</sup>

Contracts of marriage have their own particular distinctions and exceptions, which it will not be necessary for us to inquire into here; it being sufficient for our purpose to state the general rule, that a marriage contracted according to the *lex loci* will be binding all the world over, unless it is contrary to the principles of Christianity. So polygamy, or incestuous marriages, would not be recognized by any Christian country.<sup>2</sup> And a learned judge has said on this point, that, "If a foreign State allows of marriages incestuous by the law of nature, as between parent and child, it would not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be holden valid in a State where they are not allowed. As in this State (Massachusetts), a marriage between a man and his deceased wife's sister is lawful; but it is not so in some States. Such a marriage celebrated here would be held valid in any other State, and the

tin R., 28; *Liv. Diss.*, p. 46; *Burge Com.*, pt. 1, 29; *Clegg v. Levy*, 3 Camp., 166.

<sup>1</sup> *Acabal v. Levy*, 10 Bing. R., 876. But see *Story Conf.*, 398.

<sup>2</sup> *Pulley on Mor. Phil.*, b. 3, ch. 6; *Kent Com.*, lect. 26, p. 81; 1 *Blk. Com.*, 486; *Grotius*, b. 2, ch. 5, s. 9; 1 *Burge Com.* on *Col. and For. L.*, 188; *Greenwood v. Curtis*, 6 Mass. R., 878, and cases cited.

parties entitled to the benefit of the matrimonial contract."<sup>1</sup>

The exceptions, however, to the general principles of the application of the *lex loci* are very numerous, and the fine-drawn distinctions and rules laid down in the many conflicting decisions have very much embarrassed the subject. Thus in one case it is said, that the days of grace allowed upon bills of exchange are to be computed according to the usage of the place in which they are to be paid, and not of the place in which they were made, for that is presumed to have been the intention of the parties;<sup>2</sup> whereas the decisions in other cases distinctly recognize the practice, that the drawer or endorser, upon return of a foreign bill under protest, pays the damages allowed by the law of the place where the bill was drawn or endorsed.<sup>3</sup>

Pardessus has discussed this matter at large and states the general doctrine that the place where the bill is drawn is to govern. And he applies the same rule to damages, and says that if the law of the place where a bill is drawn admits of the accumulation of costs and charges on account of re-exchanges (as is the law of some countries), in such a case each successive endorser may become liable to the payment

<sup>1</sup> *Greenwood v. Curtis*, 6 Mass. R., 378; *Medway v. Needham*, 16 Mass. R., 157.

<sup>2</sup> *Videl v. Thompson*, 11 Martin's Louis. R., 23; *Bank of Washington v. Triplett*, 1 Peters. U. S. R., 25.

<sup>3</sup> *Hendricks v. Franklin*, 4 John. R., 119; *Graves v. Dash*, 12 John. R., 17; *Slocum v. Pomery*, 6 Cranch R., 221; *Hazlehurst v. Kean*, 4 Yeates R., 19.

of such successive accumulations, if allowed by the law of the place where they made their respective endorsements. And as each endorsement is a new contract,<sup>1</sup> the law of the place where it is made, will govern, as between the immediate parties.<sup>2</sup> Thus it may be stated in general terms, that negotiable paper of every kind is governed and construed as to the obligation of the drawer or maker by the law of the place where it is drawn or made; and as to the acceptor by the law of the place where he accepts; and as to the endorser by the law of the place where he endorses.<sup>3</sup> And notice of the dishonor of a foreign bill, is to be given according to the law of the place where the acceptance is dishonored, though the other parties resided in England.<sup>4</sup> And this rule seems to be generally followed in the English Courts and in some of the United States. The drawer may consequently be liable to one rate of damages, and the endorser to another. Thus, suppose a negotiable bill drawn in Massachusetts on parties in England, is endorsed in New York, and subsequently in Mary-

<sup>1</sup> *Champant v. Lord Ranelagh*, Prec. in Chy., 128; *Fanning v. Consequa*, 17 John. R., 511; *Henry on For. Law*, 53; *Powers v. Lynch*, 3 Mass. R., 77; *Prentiss v. Savage*, 13 Mass. R., 20; *Hicks v. Brown*, 12 John. R., 142.

<sup>2</sup> *Pardessus Droit Com.*, art. 1500. See also *Henry on For. Law*, 53; 3 *Kent. Com.*, p. 115, 3d edit.; *Rothschild v. Currie*, 1 Adolph. & Ell., N. R., 43.

<sup>3</sup> *Potter v. Brown*, 5 East. R., 124; *Ory v. Winter*, 16 Martin's Louis. R., 277; *Blanchard v. Russell*, 13 Mass. R., 1; 2 Bell's Comm., 692.

<sup>4</sup> *Rothschild v. Currie*, 1 Adolph & Ellis, N. R., 43; *Sherill v. Hopkins*, 1 Cown's R., 103; *Ayman v. Sheldon*, 12 Wend., 439.

land; and afterwards the bill is dishonored, the damages in such a case will be computed according to the *lex loci contractus* respectively, as between the several parties. Now the damages in these different states vary materially. In Massachusetts it is ten per cent.; in New York, twenty per cent., and in Maryland, fifteen per cent.<sup>1</sup> The drawer of the bill is liable only according to the law of the place where it is made, and the successive endorsers accordingly to the law of the place of their respective endorsements; consequently the endorsers in this case are not only unequally liable as between themselves, but are both liable to a higher rate of damages than they can recover from the drawer.

But in contracts for the payment of money at a given time, in a foreign territory, if the rate of interest be not stipulated, and there should be default in payment, the law of the place of payment regulates the allowance of interest, for the default arises there.<sup>2</sup> If, however, the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though that rate be higher than that allowed by the law of the place of performance, the specified rate of interest will nevertheless be allowed by the courts of justice in the place of performance, for that is part of the substance of the contract.<sup>3</sup> Thus the place where the

<sup>1</sup> *3 Kent. Com.*, p. 116.

<sup>2</sup> *Cooper v. The Earl of Waldegrave*, 2 *Beavan*, 282.

<sup>3</sup> *Depan v. Humphreys*, 20 *Martin Louis. R.*, 1. In this case the English and American authorities, and the opinions of the Conti-

contract is made is to determine the rate of interest when interest is specifically given, even though the loan be secured by mortgage on lands in another State, unless it appears that the parties had in view the laws of the latter place in respect to interest,<sup>1</sup> in which case the rate of interest of the place of payment is to govern.<sup>2</sup> The general rule, then, may be stated to be, that interest is to be paid according to the law of the place where the contract is made, unless payment is to be made elsewhere, and then it is to be according to the law of the place of performance.<sup>3</sup> And it is now the adopted rule both in England and this country, that the rate of interest is to be according to the law of the place where the money is to be used or paid, or to which the loan specifically referred. So a loan contracted in London, to pay in America at a rate of interest exceeding the lawful rate of England, is not usurious, for the stipulated interest was part and parcel of the contract.<sup>4</sup> And Judge Story<sup>5</sup> states the rule in direct language, that interest is to be paid on contracts according to the

national civilians, are fully examined and discussed. *Healy v. Gorman*, 3 Green N. J. R., 328.

<sup>1</sup> *De Wolf v. Johnson*, 10 Wheat., 367; *Dela Chaumette v. Bank of England*, 8 B. & Cress., 208.

<sup>2</sup> *Scofield v. Day*, 20 John. R., 102; *De Wolf v. Johnson*, 10 Wheat., 367; *Quince v. Callender*, 1 Dessaus S. C. R., 160.

<sup>3</sup> *Robinson v. Bland*, 2 Burr. R., 1078; *Cooper v. The Earl of Waldegrave*, 2 Beavan, 282; *Archer v. Dunn*, 2 Watts & Serg., 328; *Thomas v. Beekman*, 1 B. Monroe's R., 34; *Boyce v. Edwards*, 4 Peters' U. S. R., 111.

<sup>4</sup> *Thompson v. Powles*, 2 Simons' R., 194.

<sup>5</sup> *Story on Conf. L.*, 456.

law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid.<sup>1</sup> *Usurum modus ex more, ubi contractum*

<sup>1</sup> *Fergusson v. Fyffe*, 8 Clarke & Fin., 121, and cases cited; *Conner v. Bellamont*, 2 Vern. R., 382; *Cash v. Kennion*, 11 Vesey R., 314; *Robinson v. Bland*, 2 Burr. R., 1077; *Elkins v. East India Company*, 1 P. W., 395; *Ranclagh v. Champant*, 2 Vern. R., 395, and note; *ibid*, by Raithby; 1 *Chitty on Com. & Manuf.*, ch. 12, pp. 650, 651; 3 *Chitty*, id., ch. 1, p. 109; *Eq. Abridg.*, Interest E.; *Henry on Foreign Law*, 43, note; *Id.*, 53; 2 *Kains Equity*, B. 3, ch. 8, s. 1; 2 *Fonbl. Eq.*, B. 5, ch. 1, s. 6, and note; *Bridgman's Equity Digest*, Interest vii.; *Fanning v. Consequa*, 17 John. R., 511; *S. C.*, 3 John. Ch. R., 610; *Hosford v. Nichols*, 1 Paige R., 220; *Houghton v. Page*, 2 N. Hamp. R., 42; *Peacock v. Banks*, 1 Minor R., 387; *Lepire v. Smith*, 13 Louis. R., 91, 92; *Thomson v. Ketchum*, 4 John. R., 285; *Healy v. Gorman*, 3 Green. N. J. R., 328; 2 *Kent Com.*, p. 460, 3d ed.

The case of *Arnott v. Redfern* (2 Carr. & Payne, 88) is not inconsistent with the general doctrine above stated, though at first view it may seem to be so. In that case, the original contract was made in London, between an Englishman and a Scotchman. The latter agreed to go to Scotland four times a year to sell goods and collect debts, as agent for the other party, to remit the money, and guaranty one-fourth part of the sales; and he was to receive one per cent. upon the amount of the sales, &c. The agent sued for a balance of his account in Scotland, and the Scotch Court allowed him interest on it. The judgment was afterwards sued in England, and the question was whether interest ought to be allowed. Lord Chief Justice Best said: "Is this an English transaction? For if it is, it will be regulated by the English rules of law. But if it is a Scotch transaction, then the case will be different. This is the case of a Scotchman who comes into England and makes a contract. As the contract was made in England, although it was to be executed in Scotland, I think it ought to be regulated according to the rules of the English law. This is my present opinion. These questions of international law do not often occur." And he refused interest because it was not allowed by the law of England. The Court afterwards ordered interest to be given, upon the ground that the balance of such an account would carry interest in England. Lord Chief Justice Best rightly considered the contract as an English contract. The services of the agent were to be performed in Scotland, but the commission was to be paid in

*est, constituitur.*, says the Digest.<sup>1</sup> Thus a note made in Canada, where interest is six per cent., payable in England, where it is five per cent., bears English interest only.<sup>2</sup> Loans made in a place bear the interest of that place, unless they are payable elsewhere; and if payable in a foreign country, they bear any rate of interest not exceeding that which is lawful by the laws of that country.<sup>3</sup> And on this account a contract for a loan made and payable in a foreign country, may stipulate for interest higher than that allowed at home.<sup>4</sup> If the contract for interest be illegal there, it will be illegal everywhere.<sup>5</sup> But if it be legal where it is made, it will be of universal obligation, even in places where a lower rate of interest is prescribed by law.

Thus then the general rule of the common law, that the *lex loci contractus* will govern as the rule of interest, follows out the doctrine of the civil law, *cum iudicio bonæ fidei deceptatur, arbitrio judicis usurarum modus, ex more regionis, ubi contractum, constituitur; ita tamen ut legi non offendat.*<sup>6</sup> But if the

England. A contract made to pay money in England, for services performed abroad, is an English contract, and will carry English interest.

<sup>1</sup> *Dig.*, Lib. 22, Tit. 1; *Burge. Com. on Col. & For. Law*, p. 860.

<sup>2</sup> *Scofield v. Day*, 20 John. R., 102.

<sup>3</sup> *Dewolf v. Johnson*, 10 Wheat. R., 367; *Consequa v. Willing*, Peters. Cir., 225; *Andrews v. Pond*, 13 Peters. R., 65; *Thompson v. Ketchum*, 4 John. R., 285.

<sup>4</sup> 2 *Kent Com.*, p. 460; *Houghton v. Paige*, 2 N. Hamp. R., 42.

<sup>5</sup> 2 *Kain's Equity*, B. 3, ch. 8.

<sup>6</sup> *Dig. Lib.*, 22, 1; 1 *Burge. Com.*, p. 1, ch. 1.

place of performance is different from that of the contract, then the parties may stipulate for any rate of interest not exceeding that which is lawful in the place of performance. And in the absence of any express agreement as to interest, the law of that place will silently furnish the rule.<sup>1</sup>

Clear as this general rule seems to be, its application has not been found without embarrassment. Thus, a party in China consigned goods to New York for sale, and delivered them to the agent of the consignee, the proceeds to be remitted back to the consignor in China; on a failure to remit, the question arose whether interest should be computed according to the Chinese or New York rates. Mr. Chancellor Kent, referring to the general principle above stated, held, that it should be according to the rate in China, because the delivery of the goods being made there, and the remittance to be made to the same place, the contract was not complete until the remittance was received there. But the Court of Appeals reversed this decision; only upon the ground, however, that the delivery of goods in China to be sold at New York, was not distinguishable in principle from a delivery at New York; and that the remittance would be complete in the sense of the contract, the moment the money was put on board the proper conveyance from New York to China, and it was then at the risk

<sup>1</sup> 2 *Kent. Com.*, 460, 3d edit.; *Henry on For. Law*, p. 53; *Ekins v. East India Co.*, 1 P. W., 396; *Smith v. Mead*, 3 Con. R., 253; *Winthrop v. Carlton*, 12 Mass. R., 4; *Foden v. Sharp*, 4 John. R., 183. See *Story Conf.*, 469.

of the consignor. The duty of remittance was to be performed in New York, and the failure was there; consequently the New York rate of interest only was due.<sup>1</sup> In another case,<sup>2</sup> a note was given in New Orleans for a large sum of money, bearing the legal rate of interest in Louisiana (ten per cent.), and made payable in New York, with the amount whereof the defendants had debited themselves in their account with the plaintiff, and on suit brought they endeavored to avoid payment, upon the ground of usury. The Supreme Court of Louisiana decided that it was not usurious; and that although the contract was to be performed in New York, where interest was only seven per cent., yet the parties might stipulate for interest, either according to the law of New York or Louisiana. Mr. Justice Story, in commenting on this case, says: "The Court seems to have founded their judgment upon the ground that in the sense of the general rule already stated, there are, or may be, two places of contract; that in which it is actually made, and that in which it is to be performed. *Locus, ubi contractus celebratus est; locus, ubi destinata solutio est*; and therefore, if the law of both places is not violated in respect to the rate of interest, the contract for interest will be valid. In support of their decision, the Court mainly relied upon certain learned jurists of Continental Europe, whose language, however, does not appear to justify any such interpreta-

<sup>1</sup> *Consequa v. Fanning*, 3 John. Ch. R., 587.

<sup>2</sup> *Depau v. Humphreys*, 20 Martin R., 1.

tion when properly considered, and is perfectly compatible with the ordinary rule, that the interest ought to be according to the law of the place where the contract is to be performed." The learned commentator then enters into a critical examination of the authors referred to, namely, Huberus, Everbardus, Alexander, Duinolin, Burgundus, Bartolus, Voet and other illustrious writers, and successfully and completely refutes the doctrine maintained in the case of *Depau v. Humphreys*, and says in conclusion, that it is not supported by the reasoning or principles of foreign jurists. It is certainly at variance also with the doctrine maintained by Lord Mansfield and the Judges of the King's Bench, in *Robinson v. Bland*, that the law of the place of performance constitutes the true test by which to ascertain the validity or invalidity of contracts. And in a recent case in the Supreme Court of the United States, the doctrine is expressly adopted, that contracts made in one place to be executed in another, are to be governed as to usury, by the law of the place of performance.<sup>1</sup>

The question, therefore, whether a contract is usurious or not, depends not upon the rate of interest allowed, but upon the validity of that interest in the country where the contract is made, and is to be executed.<sup>2</sup> A contract made in England for advances to be made at Gibraltar, at a rate of interest beyond that of England, would nevertheless

<sup>1</sup> *Andrews v. Pond*, 13 Peters. R., 65, *et post*.

<sup>2</sup> *Harvey v. Archbold*, 1 Ryan & Mood. R., 184.

be valid in England; and so a contract to allow interest upon credits given in Gibraltar at such higher rate would be valid in favor of the English creditor.<sup>1</sup>

And in cases of this sort, it will make no difference (as we have seen) that the due performance of the contract is secured by a mortgage or other security upon property situate in another country, where the interest is lower. For it is collateral to such contract, and the interest reserved being according to the law of the place where the contract is made, and to be executed, there does not seem any valid objection to giving collateral security elsewhere to enforce and secure the due performance of a legal contract.<sup>2</sup> And where a debtor in one country afterwards, in consideration of further delay, entered into a new contract in another country to pay a higher rate of interest upon the debt than that allowed by the law of the country where the original debt was contracted, but not exceeding the legal rate in the country where the new contract is made, it has been decided that such stipulation is valid.<sup>3</sup>

And in another case it has been decided, that where the interest stipulated is according to the rate of interest allowed in the country where the debt was originally contracted, but higher than that in

<sup>1</sup> *Harvey v. Archbold*, 1 Ryan & Mood. R., 184; *Story Conf.*, 458.

<sup>2</sup> *Conner v. Bellamont*, 2 Atk. R., 382; *Stapleton v. Conway*, 3 Atk. R., 727; *Story Conf.*, p. 459.

<sup>3</sup> *Conner v. Bellamont*, 2 Atk., 382.

the country where the new contract was made, it is a valid contract.<sup>1</sup>

If, however, the form of a bill of exchange, drawn upon and payable in a foreign country, is a mere shift to disguise usury, the form will be utterly disregarded, and the court will decide according to the real object of the parties. Thus, where a bill of exchange was drawn in New York, payable in Alabama, and the bill was for an antecedent debt, and a large discount was made from the bill, greater than the legal interest in either State, for the supposed difference of exchange the court considered the real question to be as to the *bona fides* of the parties. And Chief Justice Taney said:<sup>2</sup> "Another question presented and much discussed here is, whether the validity of this contract depends upon the laws of New York or those of Alabama. So far as the mere question of usury is concerned, the question is not very important; there is no stipulation for interest apparent on the paper. The ten per cent. in controversy is charged as the difference in exchange only, and not for interest and exchange. And if it were otherwise, the interest allowed in New York is seven per cent., and in Alabama, eight; and this small difference of one per cent. per annum upon a forbearance of sixty days could not materially affect the rate of exchange, and could hardly have any influence on the inquiry to be made by the jury. But there are other considerations which make it

<sup>1</sup> *Dewar v. Span*, 3 T. R., 435.

<sup>2</sup> *Andrews v. Pond*, 13 Peters. R., 65.

necessary to decide this question. The laws of New York make void the instrument when tainted with usury; and if this bill is to be governed by the laws of New York, and if the jury should find that it was given upon an usurious consideration, the plaintiff would not be entitled to recover, unless he was a bona fide holder without notice, and had given for it a valuable consideration; while by the laws of Alabama, he would be allowed to recover the principal amount of the debt without any interest. The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury. And in the case before us, if the defendants had given their note to H. M. Andrews & Co. for the debt then due to them, payable at Mobile in sixty days, with eight per cent. interest, such a contract would undoubtedly have been valid, and would have been no violation of the laws of New York, although the lawful interest in that State is only seven per cent. But the defendants allege that the contract was not made with reference to the laws of either State, and that a higher rate of interest than that allowed by the laws of New York was reserved, under the name of exchange, in order to evade the law. If this defence is found true by the jury, the question is not which

law is to govern in executing the contract, but which is to decide the fate of a security taken upon an usurious agreement which neither will execute. Unquestionably it must be the laws of the place where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a bona fide agreement, made in one place, to be executed in another. In the last mentioned cases, the agreements were permitted by the *lex loci contractus*, and will even be enforced there, if the party be found within its jurisdiction. But the same rules cannot be applied to contracts forbidden by its laws, and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere." And in all cases of this sort, the court will look to the real intention of the parties.

But on the subject of conflicting laws, it may be generally observed that there is a stubborn principle of jurisprudence that will often intervene, and act with controlling efficacy. This principle is, that when the *lex loci contractus*, and the *lex fori* as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. *In tali conflictu magis est ut jus nostrum quam jus alienum servemus.*<sup>1</sup>

<sup>1</sup> *Huberus*, 1, 3, 11; *Lord Ellenborough, in Potter v. Brown*, 5 East. R., 131; *Kent Com.*

## CHAPTER VI.

### POLICY OF THE USURY LAWS, AND THEIR EFFECT UPON COMMERCE.

COMMERCE is the "*Vena Porta*" of a nation's wealth, and to this sentiment of Lord Bacon's, the public mind at this day, is sensitively awake. The mercantile interests of the country, are generally guarded with jealousy and care, and their spreading influence justly viewed with pride and exultation. It is the chief reliance of the nation, the main artery of her wealth, and the principal means by which she prospers and advances in power and refinement. By it alone can the numerous wants of civilized life be supplied, and the peculiar productions of other countries be brought home; and while none are wholly independent of it, all are more or less remotely benefited by it; for at the same time that it supplies our wants and enriches the country, it gives employment and wealth to every other pursuit — the freest countries have always been the most commercial, the most enslaved the least so — "so every one is not only to join in this trade, as far as he reasonably can, but is bound to countenance and promote it."<sup>1</sup> And who

<sup>1</sup> *Vattell*, b. ii., c. 2, sec. 22.

that is familiar with English classics, has not dwelt with delight on the description of the extent and blessings of commerce, which Addison has given with graceful simplicity, in one of the *Spectator's* visits to the Royal Exchange.<sup>1</sup>

But commerce, to attain to dignity, must be untrammelled by arbitrary laws; and Vattel says, that “Freedom, being very useful to commerce, it is implied in the *duties of nations*, that instead of unnecessary burdens or *restrictions*, they should support it as far as possible; therefore those peculiar statutes which obtain in many places, so oppressive to commerce, are blameable, unless founded on very important reasons, arising from the public good.”

It cannot then be but matter for surprise that the United States and Great Britain, the two most enlightened and powerful nations on earth, should still be hampered by antiquated laws upon the subject of interest, and, contrary to the *free* and *progressive* spirit of the age, prohibit their communities from making money as profitable to its owners as any other article of their possessions, by continuing restrictions upon its use, which other less valuable things are not liable to.

Laws settling the rate of interest at which money shall be computed in cases where the parties have not previously settled it themselves, are of manifest utility, as in cases of trusts, executorships, agencies,

<sup>1</sup> *Spectator*, v. i., No. 69.

and the like. But, as we have already seen, there are grave objections to the policy of usury laws making it punishable to ask and receive a higher rate of interest than the one established by law, even where the parties make their mutual contract with their eyes open, and with a full knowledge of their own reasons and motives. Why would it not be just as reasonable for the legislature to make it punishable for a man to take *less* than the rate named, as to forbid his taking more. Men of adult age and common sense, surely know their own interest better than any legislature can tell them; nor is it fair to impute dishonesty to a transaction voluntarily entered into by the parties, fully aware of all the facts of the case, which ought to guide them. Legislators are incompetent to the purpose of making contracts by law, because they cannot know the circumstances under which the parties severally contract with each other. Besides, if a man is "*compos mentis*," and neither a minor, under duress, or an habitual drunkard (for all which cases the courts afford ample relief), he *must* know better than the legislature whether it will be to his advantage to borrow at ten, or fifteen, or twenty per cent.; but if he is not competent to judge of such matters, and borrow money to suit his own affairs, then surely he is not competent to trade with and sell his own goods. Yet the law prevents him from borrowing on what it deems disadvantageous terms, though it cannot prevent his selling his goods at a ruinous sacrifice. The consequence is, that

in order to save his credit or supply an urgent necessity, he may be compelled to raise money by a forced sale, and sustain thereby much greater loss than had he borrowed at an increased rate of interest. The loss attending forced sales bears in general no proportion to what would be deemed an extravagant interest; as, where a man's moveables are taken in execution, they may be considered as pretty well sold if they produce one-third of what it would cost to replace them. In this way the loving-kindness of the law costs him sixty-six *per cent.*, whereas, had he been allowed to offer even as high as twenty per cent. per annum, it would be upwards of three years before he paid what the law charged him at once;<sup>1</sup> and thus the Legislature may ruin a man. There may be worse cruelty, but there cannot be greater folly.

Money is really worth more at one time than another; and to one person more than to another: as, suppose a sudden contraction of bank issues, and a consequent scarcity in the money market—the merchant might readily be pressed for a sum of money for a short time. Or, suppose the offer of a good bargain in an article which is indispensable to the borrower. If he can borrow at eight or ten per cent., and make *twenty* per cent. of the loan, it is difficult to see why he should be debarred from so doing.

The usury laws are no doubt intended for the protection alike of borrowers and lenders—as well to

<sup>1</sup> “*Usury doth but gnaw upon him, whereas, bad markets would swallow him quite up.*”—(Lord Bacon.)

save the needy from becoming the victims of the avaricious, as to remove (by affixing penalties) the temptation, afforded by the prospect of extravagant interest, to lend on insufficient securities.<sup>1</sup> Thus, Lord Chief Justice Best, in delivering the opinion of the twelve Judges in the House of Lords in 1825, said : “ The supposed policy of the usury laws in modern times, is to protect necessity against avarice ; to fix such a rate of interest as will enable industry to employ with advantage, a borrowed capital, and thereby to promote labor and increase the national wealth ; and to enable the state to borrow on better terms than would be made, if speculators could meet the minister in the money market on equal terms.” Applying this interpretation to our own country, let us inquire how far this policy has been successful.

We have already seen, that no sooner had specie become a circulating medium with a settled value, than the use of it became worth paying for by those who had it not of their own. The consequence was, that those who had it made the most of it, and the wealthy lender too often became extortionate, and took from his client more than the hire of the commodity was really worth. To prevent this, the Legislature interfered ; but this legislative interference, while it rarely reached the end at which it aimed, was baneful in its effects upon commerce, for

<sup>1</sup> Lord Mansfield says : “ *To protect men who act with their eyes open, against themselves.*”

commerce cannot exist without mutual and extensive credit, and credit is dependant upon profits.<sup>1</sup> “It is vanity to suppose there can be borrowing without profit, and as great inconveniences would arise if borrowing were cramped in order to retain the advantages and avoid the disadvantages of usury, two rates of interest should be adopted, a less and a greater—the one to suit the borrower who has good security, and the other to suit the merchant whose profits being higher, will bear a greater rate.”<sup>2</sup> Again, “money,” says the immortal Locke, “is an universal commodity, and is as necessary to trade as food is to life, and everybody must have it *at what rate they can get it*, and invariably pay dear when it is scarce; you may as naturally hope to set a fixed price upon the use of houses or ships as of money. Those who will consider things beyond their names, will find that money, as well as other commodities, is liable to the same change and inequality, and the rate of money is no more capable of being regulated than the price of land.”

So we see that unless money can be borrowed, trade cannot be carried on; and if no premium is allowed for the hire of money, few persons will care to lend it, or at least the ease of borrowing “at short warning, which is the life of commerce,” will be entirely at an end. Few will care to risk their means

<sup>1</sup> 2 *Bl. Com.*, 455.

<sup>2</sup> *Lord Bacon*. (It will be remembered that the legal rate of interest was eight per cent. in his time.)

in the speculations of another, unless a reward *commensurate with the hazard* run is held out. The hazard of loss *must* have its weight in the regulation of interest. If this be true, and to prevent borrowing is to prevent trade, then, though in a less degree, to *permit* borrowing, but only at a rate of interest below the actual market value of money, is to *retard the progress of business*, for it drives the capitalist who respects the law or fears its penalties, from the market, and, by withholding the current "*which turns the wheels of trade*," limits the productive power of the capital and industry of the country.

But the necessities of individuals will make borrowing unavoidable, and money upon some terms must be had wherewith to make money. Industry and enterprise are often totally useless if unaided by capital, and therefore it becomes necessary for one possessing and desirous of using these valuable advantages, to borrow; in return for which, he must forego a portion of the profit which he realizes. This portion he returns to the lender, who has thus made a profit, while the borrower has been doing the same. Both have been benefited. The capitalist has been paid for the use of his goods, and the risk he ran of losing them, while the borrower has been paid for his enterprise and industry. These were his own—the invested capital another's. A market has been found for that which each possessed by joining them together. This is the proper working of the system, but can only follow where the rate

of interest is not so great as to swallow up all the profit made by the trader. There must be two shares — one to pay for the hire of the tools, and another to pay the mechanic who uses them. Money thus becomes an article with a value attached to it, in the same manner as the industry employed ; and hence the necessity that exists for borrowing and lending money on interest, and the adoption of the method in all properly regulated commercial communities.

But let us glance now at some of the inconsistencies of the law. *Compensation must be proportioned to the risk.* The law recognizes this principle in the case of bottomry and respondentia bonds ; every insurance office insists on it, while the whole business of the stock exchange is founded on it, because it is a principle of common sense strangely ignored by usury laws. The prohibition of catching bargains in the case of minors depends upon other considerations, and laws prohibiting them may well be justified, for in this case there is inexperience and incompetence of judgment. No infant can contract but for his own manifest advantage, as in the case of necessaries. But where is the reason for the distinction between risks by land and risks at sea ? In both cases the lender can indemnify himself by insurance or other collateral security ! Yet the necessity of maritime usury in bottomry and respondentia bonds is everywhere admitted ; no evil tendency is feared from it, and the propriety of leaving

the ship captain and merchant to judge for themselves what is best for their own interests is universally recognized.

Besides maritime loans, however, there is another legalized system of usury, which falls heavily upon the needy and distressed of the poorer classes. We allude to Pawn-broking.<sup>1</sup> In this business there is no risk, for the pawn-broker lends only on pledges, amply sufficient to secure him, and easily converted into money at the end of the year—the time generally limited for their redemption. While there is no clause in the law restraining him from receiving in pledge the garment from a man's back, that may be necessary to preserve his health, and keep him from becoming a charge upon the community in a public hospital; nor is there anything in the law which prevents the mechanic from pawning his tools—the very instruments by which he is to live and sustain his family—to raise money at twenty-five per cent. It is vain to say that the excess above the six, or seven, or even ten per cent, which the pawn-broker's money may be worth, is the expense of storage, care, and labor, (the risk of loss by fire is expressly exempted by the law, and assumed by the unfortunate borrower, in addition to the exorbitant usury which he pays), and it must, therefore, be confessed that the law has dealt most liberally with a trade of far more than questionable public utility.

<sup>1</sup> In some states the rate of interest allowed to pawn-brokers is as high as twenty-five per cent. per annum. In Pennsylvania it is *seventy-two* per cent. per annum.

It is true that in some states pawn-brokers are limited to charge this rate only upon loans under twenty-five dollars; yet the spirit of this restriction is easily and daily evaded with perfect impunity: as where a man wants to borrow one hundred dollars on his watch, the pawn-broker will not lend that sum on the watch, because on that sum on one pledge he can charge but seven per cent.; but he will lend twenty-five dollars on the watch and twenty-five dollars on each for the ring, key, and seal attached, and thus make up the sum required, in the shape of four distinct pledges. But again, the want of twenty-five dollars is not more keenly felt by one needy man than the want of twenty-five hundred dollars by another, for the importance of the sum is determined by the relative circumstances of the parties; and there seems, therefore, no reason why the benefits of the system, if benefits there really be, should not be extended to all classes alike; but if the system is injurious, then it should be abolished in toto.

There is still another grave inconsistency in the Usury laws, namely: the fixing but one rate of interest for every kind of security. "As well might a clause be added, fixing and reducing the price of horses. It may be said against fixing the price of horse-flesh, that different horses may be of different values; I answer, not more different than the values which the use of the same sum of money may be of to different persons on different occasions."<sup>1</sup> Money

<sup>1</sup> *Jeremy Bentham; Def. of Us.,* p. 82.

advanced on landed property may be considered as generally well secured, and the risk extremely small; whereas money lent for use in trade or business, upon contingent, personal, or terminable securities, is greatly more hazarded, and should pay accordingly.<sup>1</sup> Yet the law does not discriminate in these cases. The degree of risk run by the lender *must* enter into the contract, as we have seen that it does in bottomry and *respondentia* bonds.

But the happiest results to the trading community, it is believed, would follow the removal of all restrictions upon pecuniary bargains, not even excepting those relating to mortgages and other securities on land. It is true that land-owners, as a class, have always been opposed to the abolition of the usury laws, chiefly because, as they affirm, much of the money now lent on mortgages would, if these laws were abolished, be called in, should money become scarce and rates increase, to be employed at greater interest elsewhere,<sup>2</sup> or the higher rate be demanded

<sup>1</sup> The matter is thus stated by Grotius,\* "If the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, its allowance is neither repugnant to the revealed nor the natural law; but if it exceeds those bounds it is then oppressive usury; and though the municipal laws may give it impunity, they can never make it just."

<sup>2</sup> "Those who have large landed estates have always been envious of the sudden fortunes raised by commerce, and the improvements and increase of personal estates. Treatise on treatise may be written to prove that these two interests mutually support and strengthen each other; the prejudice may indeed be somewhat lessened, but cannot be radicated."—(Barr. *Obs. on the Stat. of Merton.*)

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\* *De jur. belli et pacis*, 2, 1, c. 12, Sec. 22.

of them. But it is not believed that this theory would be realized in practice. There are always capitalists who, not being in the active pursuit of business, prefer to invest their money in the safe and simple form of mortgage, regarding it as more permanent and fixed, less liable to contingencies, and the income derived therefrom consequently more settled, regular, and certain. Besides which, the chance urged by the land-owners may be provided against, as indeed it almost always is, by a stipulation between the parties in the deed itself, setting a term of months or years, when the principal shall become due.

But let us proceed, and see if there are any more reasons for desiring some alteration in the present system. It is competent in some States for a debtor, when sued for the principal and interest, or any part of them, on a contract tainted by usury, to set up the usury as a defence, and if he can prove it, entirely escape payment.<sup>1</sup> Now, ask any man of sound moral principle, if he can call that honest? or any man of common sense, if it is not a premium held out by law for rascality? Thus a man borrows one thousand dollars, and agrees to give a thousand for the convenience of the loan, and accordingly executes a bond, conditioned to pay two thousand dollars within (say) two years; when by the terms of the bond it becomes due, he sets up a plea of

<sup>1</sup> 2 R. S. N. Y., c. 4, p. 3, 3d edit. Similar in Connecticut and other States. See end of 4th chapter.

usury, and the statute declares that he is not bound to pay principal or interest, or, in short, anything at all. The benefits he may have derived from the use of the money are of no account; the fortune he may have made or preserved with it cannot be urged; and even the gratitude which he owes, along with the money, is ignored. This is surely encouraging a debtor to ask and receive from a court of *justice* the annulling of a bond which he has solemnly promised to keep and perform. It is no argument to say that it is seldom done, and that many lenders guard against it; *the law permits it*, and is, therefore, defective. What else can this be called than repudiation, sanctioned by law? This is another risk encountered by the creditor, for which the borrower must pay.

Again, how are individuals affected in the eye of the law by the operation of those we are discussing? "Without some profits (*adequate to the risks run*) allowed by law, there will be but few lenders, and those principally *bad men*, who will break through the law, and make a profit, and then will endeavor to indemnify themselves from the danger of the penalty by making that profit exorbitant."<sup>1</sup> The lenders are also few, where the "profit allowed by law" is insufficient; and if they "indemnify themselves" by "making that profit exorbitant," they are "*bad men*." Yet the law in this case operates with much force to make them so.

<sup>1</sup> *Bl. Com.*, v. 2, p. 456.

In Hindostan (where no rate is fixed by law), the customary price of money is *ten* per cent. In Russia, it is limited to *twelve* per cent.; in some of the German States, it is as high as *twenty*; in England, *five*; and in the United States we have various rates, ranging from *five* per cent. upwards. Now of all these widely differing rates, what one is there that is intrinsically more proper than another? What evidences the propriety in each case, but the mutual convenience of the parties? In Holland, it is lawful for a man to take *twenty* in a *hundred*, "if he can get it;" and yet money is plenty there at *five* and *six* per cent.

Money has a value besides that contemplated by law, and which the law can never fix, namely, a *market value*; for like grain or cotton, though not so frequently or suddenly, it fluctuates in value according to the state of trade, and the amount of money in the country. It is true, that when borrowers are poor, and lenders are pitiless, cases of extortion sometimes occur; and to supply a present necessity, a man may agree to pay a higher rate for the accommodation than it is actually worth; but the law, by throwing obstacles in his way, only adds to his expenses. So with young and inexperienced men, just entering into business, who are sanguine of large profits. "Yet it is certain," says Lord Bacon, "that the greater part of trade is driven by young merchants, who borrow upon interest, and though the errors of young men are the ruin of business, the

errors of aged men amount to this, that more might have been done, or sooner. And though, in the conduct and management of actions, young men embrace more than they can hold, and stir more than they can quiet, yet men of age object too much, consult too long, adventure too little, and seldom drive business home to the full period." From these and similar causes, many serious mercantile disasters spring; yet legislation does not mend the matter, nor prevent one transaction in a hundred from being tainted with usury.

All laws increasing the risk of the lender only add to the expenses of the borrower, who always pays them, and they are thus a tax upon the unfortunate and needy. But besides this, they are unequal in principle; as where a man has a thousand dollars to spare, he is prohibited from lending it for more than a certain rate of interest; but he may put it in the form of a house, and get as much as anybody chooses to give him for it, or invest it in a bank or insurance company, and get double the interest that the law allows. This is an unwise legal expulsion of money from the money market.

"All experience," says a clever English writer<sup>1</sup> on the subject, "teaches us how unprofitable it is for the law to fix a maximum rate of interest applicable to every period; when there is little demand for money, it can be borrowed for less than the legal rate of

<sup>1</sup> *Kelly on Us.*

interest on good security; when the contrary is the case, the law is evaded, and more than legal interest given, for whatever may be the municipal regulation, there is no axiom better established than that '*money, like water, will always find its own level;*' that it is governed by the same rules as to production and distribution, which affect all other merchantable commodities, and that the rate of interest for its use is no more capable of being regulated by law, than are the rates of insurance or the price of labor, and that '*free trade in money is the only way of rendering it abundant.*' On this point, too, we have the dictum of one of the greatest statesmen of the age,<sup>1</sup> in the following remarkable words: "The repeal or modification of the usury laws, is a measure, in the present age, which nearly all mankind agree is perfectly safe, and calculated to afford the greatest measure of relief, and is besides innocuous alike to the borrower, to the lender, and to the state."

What, then, after all, is the effect of usury laws? They embarrass business, keep up the rates of interest *usually paid*, induce a laxity of principle among the people, in respect to the obedience due to law, and in fact offer a premium for unfair dealing. They check the exercise of enterprise, throw stumbling-blocks in the way of commercial advancement, and are among the last vestiges of those times when the principles of commercial policy were unknown, and

<sup>1</sup> Lord John Brougham, in the House of Commons.

the legislature did not scruple to interfere with the private rights of individuals. But if a law can be devised which will not do all this, and which will place no restraint upon the liberties of commerce, and at the same time prevent cases of real extortion and usury, let us have it; if not, an abolition of the present system, and let money rise and fall in *market value*, like any other commodity, regulated only by the supply and demand. We have seen that England has set us the example; and to facilitate borrowing at short warning, which is “the life of commerce,” and thereby aid business transactions, the law is altogether abolished, as far as regards promissory notes, bonds, &c., payable within twelve months, and usurious contracts are no longer totally void. Reform *must* follow upon increased knowledge and enlightenment. *Progress* is the watchword of the age; the times are changed, and we are changed with them. *Tempora mutantur, et nos mutamur in illis.*

“Men change with fortune; manners change with climes—  
Tenets with books, and principles with times.”

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